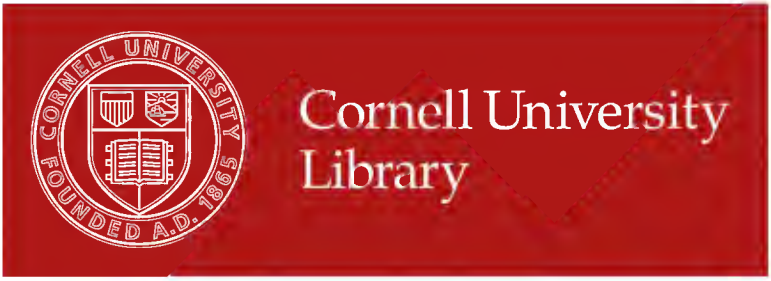

FRAUDULENT CONVEYANCES.

A TREATISE

UPON CONVEYANCES MADE BY DEBTORS TO DEFRAUD CREDITORS.

CONTAINING REFERENCES TO ALL THE CASES

BOTH

ENGLISH AND AMERICAN.

BY

ORLANDO F. BUMP,

COUNSELLOR AT LAW.

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PREFACE.

THE subject which is considered and treated in this work is one that has never been made the object of a special treatise or discussed in the light of a thorough and exhaustive collection of the authorities. It is more than seventy years since the last edition of Roberts on Fraudulent Conveyances was printed. May's Voluntary and Fraudulent Conveyances and Hunt's Fraudulent Conveyances are of a later date. These works, however, treat of the statute of 27 Eliz., as well as the statute of 13 Eliz., and are confined to the English cases. It is manifest that the subject of conveyances to defraud creditors is of sufficient importance to require a separate treatise, and those who are at all familiar with the subject, or who will take the trouble to examine this work, will know or see that the American authorities are very numerous and important. This work is therefore confined to conveyances to defraud creditors, and contains references to all the cases upon the subject.

The first difficulty to be overcome in such a work arises from the fact that various statutes have been passed in the different States. These, however, have been copied in the main from the statute of 13 Eliz., and that statute has always been considered as merely declaratory of the common law. Unity and symmetry has, therefore, been attained by considering the law of Fraudulent Conveyances as simply a part of the common law, and as the same in every country where Anglican law prevails. It is manifest, however, that whether a conveyance can defraud creditors is a question that will sometimes depend upon the condition and character of the remedies afforded by the various States. It is no part of this work to treat of local statutes affecting remedies, or relating to anything else. Each practitioner is to be presumed to be familiar with the statutes of his

own State. This work simply considers the subject as it was at common law with the remedies afforded by the common law. Cases, however, that vary from the common law have been cited as opposed to the doctrine in the text, merely to warn the practitioner that the text is not applicable to his particular State, and the apparent conflict of authorities can sometimes be explained on this ground. The author preferred, as a rule, to leave such conflict of authority without explanation, rather than encumber his work with explanations which would not interest the profession generally.

But after all the conflicting cases have been eliminated that depend upon local statutes, there still remain a large number of opposing authorities, a larger number in fact than can be found in any other branch of the law. The relation of debtor and creditor is one that appears to be simple, and to rest simply upon the duty of common honesty. It is thus a question of morals, and a question of morals is frequently made a question of public policy. About forty independent courts are thus called upon to consider and determine a question of morals and of public policy. The result is manifest and inevitable. Different minds do and inevitably must reach different conclusions, and the doctrine of each court is the law within its jurisdiction.

A work could have been written covering every point of the law, and selecting only those cases which were consistent with the author's theory of the law. Such a work, however, would have been merely theoretical, and would have been useless and misleading in those States where a contrary doctrine prevails. To avoid this objection, and render the work practical, the plan has been adopted of presenting a theory of the law in the text and citing all the authorities, so that each practitioner can tell at a glance whether any proposition is accepted in his own State.

The author will also add that he does not expect that his views will be adopted. Where eminent courts, after careful discussion, have reached different conclusions, it would be presumptuous to assert that he has accepted the better opinion, for he also is fallible. All that he has aimed to do has been to present a systematic and consistent theory of the law, and to so arrange and classify the authorities as to unfold that theory.

Conflict was there before he began his investigations, and will continue after his labors have ceased. All the merit he claims is simply that of presenting the law in a compact, accessible shape, and thus lightening the labors of a profession whose toils are arduous amid the ever-increasing multiplication of reports.

The author takes this opportunity to return his thanks to his friends for the assistance they have so kindly rendered him in the preparation of this work. To know that others sympathize with his labors, and to feel that some benefit, no matter how slight, may be conferred in return, is no inconsiderable relief to the tediousness of an author's self-imposed task.

ORLANDO F. BUMP.

Baltimore, Nov. 1*st*, 1872.

PREFACE TO THIRD EDITION.

In this edition the citation of cases has been brought down to the present year, and some portions of the work have been entirely rewritten, but in the main the author has adhered to the original plan.

Orlando F. Bump.

Baltimore, September 1st, 1882.

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FRAUDULENT CONVEYANCES.

FRAUDULENT CONVEYANCES.

CHAPTER I.

HISTORY OF THE LAW OF FRAUDULENT CONVEYANCES.

ORIGIN OF COMMERCE.—In the earliest stages of society property has no value, and the transfer of it from one to another does not give rise to the idea of an obligation. Whenever anything is transferred the parties esteem it as a present, and there is no expectation of any return. There are neither loans nor debts, and commerce is unknown. *Gaudent muneribus sed nec data imputant nec acceptis obligantur.*[1] *Fœnus agitare et in usuras extendere ignotum.*[2] Even after property has acquired a value, there is at first no commerce. A rude people make no executory contracts, but limit their dealings to barter alone. At that period there is, moreover, no facility of exchange. Transactions involving an alienation of property are rare, and conveyances are exceedingly ceremonious. Custom requires the presence of numerous witnesses, prescribes the use of a certain form of words, and demands the performance of certain symbolical acts. No part of this ceremony can be omitted, not an act, nor a gesture, nor a

[1] Tacit. Germ. c. 21. [2] Tacit. Germ. c. 26.

syllable, for if there is a single omission the conveyance is void. The early Roman law presents an apt and ready illustration of the customs of primitive times. Under that law it was necessary that the parties, a *libripens* and five witnesses should be present at every transfer of property.[1] The *libripens* attended with his scales to weigh the uncoined copper which constituted the money of that age. The vendor brought the property which was to be transferred, and the vendee brought the ingots of copper. The property was delivered with certain formalities by the vendor to the vendee in the presence of the witnesses, and the *libripens* received the ingots of copper from the vendee, and, having weighed them, delivered them to the vendor. This transaction in the earliest stages of the Roman law was called a *nexum*, and the parties were said to be *nexi*.[2] From this description of the ceremony it is manifest that the earliest use of the *nexum* was to give proper publicity to the alienation of property. It is also manifest that, at that time, trade was confined to barter merely. Contracts and commerce were unknown.

Transition from Barter to Commerce.—The next step in the progress towards commerce is the rise of contracts. These came naturally from conveyances. The *nexum* in its earliest use denoted an interchange of commodities, and comprehended both the transfer and the payment, for both acts were contemporaneous. It embraced two ideas which, at that period, were never separated in practice. In the course of time, however, cases arose where the property was delivered without the immediate payment of the money. In such cases the *nexum* was finished so far as

[1] Maine's Ancient Law, 198.

[2] Maine's Ancient Law, 309.

the vendor was concerned, but continued as to the vendee. The latter was still deemed to be *nexus* until the stipulated price was paid. Thus the term *nexum* was used to denote the delivery of the property and the obligation of the vendee for the unpaid purchase money. The next step in the line of progress was the introduction of a proceeding wholly formal, in which no property was delivered and no payment was made, and thus executory contracts arose.[1] The term *nexum*, which originally denoted the act by which the title of property was transferred from one to another, came insensibly to mean a contract, and in the course of time the association between the term and the idea of a contract became so intimate that another term, *mancipium*, or *mancipatio*, was introduced to designate the delivery of property.[1] This illustration is drawn from the Roman law, but appears to present the true and natural theory of the transition from barter to commerce. In the order of time conveyances came first, then contracts, credit and commerce. Barter is the primitive mode of exchange, and precedes the era of commercial enterprise.

Severity of Ancient Laws.—The commission of fraud, however, depends upon the power which creditors have over their debtors. The existence of commerce alone is not sufficient. There must be some temptation or impunity before frauds will be committed. If the laws are severe and rigorous, there will be no frauds; if the laws are lax, there will be a temptation, and trickery and dishonesty will arise. In primitive times the laws were exceedingly harsh. If the debt was not paid, the creditor had the right to reduce his debtor to slavery. Such was

[1] Maine's Ancient Law, 310.

the ancient law in Greece, Italy, Asia,[1] and Germany.[2] The custom was, in fact, so universal that it may be regarded as a part of the *jus gentium barbararum*.

ROMAN LAW.—The Roman law was especially severe. If a debtor was unable to pay his debt, he could sell himself to his creditor, with the condition that, if the debt was not paid before the expiration of a certain period, the creditor should have the right to take possession of his purchase. If the debt was not paid within the time fixed by the agreement, the creditor could go before the prætor and demand the possession, which would then be awarded to him, and the debtor would thus pass into his power. If the debtor refused to part with his liberty voluntarily, the creditor could pursue another course. He first summoned his debtor before the prætor, and had the justice of his claim allowed. After the entry of the judgment a stay of thirty days was given, in order to permit the debtor to see whether he could raise the money to pay the debt or not. If the debt was not paid within that time, the creditor, after its expiration, arrested him and carried him before the prætor; and if no one then would release him, he was delivered to the creditor, who took him away and kept him in private custody. There he was bound with a chain of not less than fifteen pounds' weight, and fed with a pound of corn each day. If he did not come to terms with his creditor, he was kept in prison for sixty days, and during this period he was brought into the *comitium* before the prætor on three successive market days, and the amount of his debt was proclaimed. But on the third market day he was put to death or sold into

[1] Grote's Hist. of Greece, vol. 3, pp. 95, 110, 159.

[2] Hallam's Hist. of Middle Ages, vol. 1, pp. 196, 317; Hume's Hist. of Eng., vol. 1, p. 176.

foreign slavery beyond the Tiber. If, however, there were several creditors, they might, if they wished, actually cut his body into pieces, and no creditor incurred any penalty by taking more or less than in proportion to his debt.[1]

MODERN LAW.—Villenage was the resource of insolvent debtors in the Middle Ages,[2] but after the institutions of the country became settled this practice fell into disuse. It was inconsistent with the duties of warlike service to which every man was bound under the feudal system.[3] Imprisonment for debt, however, took the place which had formerly been filled by the power to enslave. This was unknown at the common law, except in cases of trespass with force.[4] It was first given by statute against bailiffs,[5] and was subsequently extended by other acts.[6] Although this power was not as rigorous as the Roman law, yet it was always severe, and even harsh.[7]

EFFECT OF RIGOROUS LAWS.—The effect of these rigorous provisions, though contrary to the dictates of a humane policy, and repugnant to the teachings of the wisdom of an enlightened age capable of discriminating between fraud and misfortune, may be readily traced. The law of fraudulent conveyances is not to be found in the Twelve Tables.

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[1] A. Gellius, XX, 1, §§ 45 *et seq.*; Gibson's Hist. of Rome, vol. 4, p. 372; Niebuhr's Hist. of Rome, vol. 2, p. 599; Arnold's Hist. of Rome, p. 52.

[2] Hallam's Hist. of Middle Ages, vol. 1, pp. 196, 317; Hume's Hist. of Eng., vol. 1, p. 176.

[3] 2 Bell Com. 538.

[4] 1 Reeves' Hist. by Fin. 511; 2 ib. 71; 2 Bell Com. 538; 2 Kent Com. 398; Herbert's Case, 3 Co. 11.

[5] 1 Reeves' Hist. by Fin. 511.

[6] 2 Reeves' Hist. by Fin. 71; 2 Kent Com. 398.

[7] 2 May's Const. Hist. 268; 1 Benton's Thirty Years in Sen. 291.

It had its origin in a later age, when the right of the creditor to enslave his debtor had been abrogated. The cases upon the subject in England prior to the commencement of the present century are comparatively few. On the other hand, the great expansion and development of this branch of the law in America is undoubtedly due to the abolition of imprisonment for debt and the absence of a general bankrupt law. It is also worthy of notice that fraud abounded even in England as long as debtors could fly to privileged places, and be there exempt from arrest and the service of civil process.

Roman Law of Fraudulent Conveyances.—The Roman law is the oldest law upon the subject of fraudulent conveyances, and embodies all the leading principles. *Ait prætor: Quæ fraudationis causa gesta erunt, cum eo qui fraudem non ignoraverit, de his curatori bonorum vel ei cui de ea re actionem dare opportebit, infra annum quo experiundi potestas fuerit, actionem dabo; idque etiam adversus ipsum qui fraudem fecit, servabo. Hæc verba generalia sunt, et continent in se omnem omnino in fraudem factam vel alienationem vel quemcunque contractum: nam late ista verba patent.*[1] *Hoc edictum eum coercet qui sciens eum in fraudem creditorum hoc facere, suscepit quod in fraudem creditorum fiebat. Quare si quid in fraudem creditorum factum sit, si tamen is qui cepit ignoravit, cessare videntur verba edicti.*[2] *Simili modo dicimus, et si cui donatum est non esse quærendum an sciente eo cui donatum gestum sit, sed hoc tantum an fraudentur creditores.*[3] *Sciendum, Julianum scribere, eoque jure nos uti ut qui debitam pecuniam recepit antequam bona debitoris possideantur, quamvis sciens prudensque solvendo non esse*

[1] Dig. Lib. 42, tit. 9, § 1.
[2] Dig. Lib. 42, tit. 9, § 8.
[3] Dig. Lib. 42, tit. 9, § 11.

recipiat, non timere hoc edictum; sibi enim vigilavit.[1] *Quæsitum est an secundus emptor conveniri potest? Sed verior est Sabini sententia bona fide emptorem non teneri; quia dolus ei duntaxat nocere debeat qui eum admisit.*[2] These principles are sound law even at the present time.

Derivation of the Anglican Law.—Anglican constitutional[3] and criminal law[4] is derived from the Anglo-Saxons, but Anglican civil law is founded upon the Roman law.[5] By this it must not be understood that Anglican civil law is merely a servile copy or imitation of the Roman law, but that it has borrowed the principles of the latter by the nobler process of assimilation and incorporation. How far the law of fraudulent conveyances is founded upon the Roman law it is impossible to determine, on account of the paucity of the materials for forming an opinion, yet the similarity of the principles raises a suspicion which is strengthened by the other circumstances connected with the early history of Anglican law. Derivation, however, is not necessary to account for the similarity, for the law of fraudulent conveyances is founded upon the principles of common honesty, demanded by and adapted to the exigencies of commerce, and, if every memorial of the present law were blotted out, it would spring up again in nearly its present shape.

Common Law.—The cases that were decided prior to the adoption of any statute upon this subject are few and meagre; but, nevertheless, they are sufficient to show that

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[1] Dig. Lib. 42, tit. 9, § 7.
[2] Dig. Lib. 42, tit. 9, § 9.
[3] Stubbs' Select Charters, Part I.
[4] 1 Reeves' Hist. by Fin. 24, note C; 39, note C.
[5] 1 Reeves' Hist. Introduction by Fin.

the law of fraudulent conveyances is a part of the common law. A fraudulent conveyance was void as against creditors, and the property might be taken on execution.[1] Whether a gift was fraudulent was deemed a question of fact.[2] After the death of the debtor, the fraudulent grantee could be held as executor *de son tort*,[3] or relief might be had in equity.[4] These principles are sufficient to show that the foundation of the existing law upon the subject had already been laid, and, perhaps, in the course of time the necessities of commercial enterprise and the quickened sense of justice would have reared a symmetrical system without legislative aid.

STATUTES.—The statutes form an important part of this branch of the law, and show the peculiar shape which fraud assumed in ancient times. Uses had gradually been developed, and were becoming common. No device could be better adapted to facilitate a fraudulent design, for by it the legal title could be placed in another, and the profits only which were not liable to execution at law could be reserved to the debtor.[5] The first statute upon the subject in its recitals sets forth the evil devices of the times in full. It declares as a fact and a matter of notoriety that debtors gave their tenements and chattels to their friends by collusion, thereof to have the profits at their will, and afterwards fled to privileged places, and there lived a great time, of high countenance, till the creditors were compelled to take a small part of their debts and release the balance.[6] The next statute[7] upon this subject recites the

[1] As. fol. 101, pl. 72; Rol. Abr. Covin. 549; Brooke Abr. 139, Collusion, pl. 9; Fitz. Abr. Execution, 108.

[2] 13 H. IV, 4 pl. 9.

[3] 13 H. IV, 4 pl. 9; Rol. Abr. Covin. 549.

[4] 16 Edw. IV, 9.

[5] 2 Reeves' Hist. by Fin. 183, 457.

[6] 50 E. III, R. 6.

[7] 2 R. 2. c. 3.

same practice of a conveyance to the use of a debtor and a withdrawal to a privileged place where he could not be served with process, and provides a means of obtaining a judgment after a proclamation once a week for five successive weeks at the gate of the privileged place, and thus reaching the property of the debtor, whether held in trust or not. The third statute in the order of events sets forth the same practice of a fraudulent gift and a seeking of the protection of a sanctuary or other privileged place. The enactment itself is a singular conclusion to its recitals, for, as if it were designed by one vigorous stroke to cut up fraud by the roots, it abolishes all deeds of gift of goods and chattels made to the use of the grantor.[1]

IMPORTANCE OF THE STATUTES.—These statutes and their recitals are important, for they show the form assumed by fraud in those early times, and throw light upon some of the expressions used by the courts in later times. If there had never been a fraudulent conveyance to the use of a debtor, the doctrine of secret trusts would never have arisen. It is to conveyances of this class that Coke refers when he says: "Every gift made upon a trust is out of this proviso, for that which is, betwixt the donor and donee, called a trust, *per nomen speciosum*, is, in truth, as to all the creditors, a fraud, for they are thereby defeated and defrauded of their true and due debts."[2] It has been said that the act of 50 Edw. III, c. 6, is not declaratory of the common law, upon the ground that if the same principles had prevailed at the common law, the statute was in

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[1] 3 H. VII, c. 4. Finlason suggests that this is merely a declaratory act. 3 Reeves' Hist. by Fin. 143.

[2] Twyne's Case, 3 Co. 80; Moore, 638.

vain, and would never have been made.[1] This doctrine would not be accepted now, though it must be admitted that this multiplication of statutes raises grave doubts as to the vigor and force of the principles acknowledged as the common law upon this subject. If the principles which are now recognized and enforced had been adopted and acted on at common law, there would have been no grievous evils to redress, and legislative interference would not have been necessary. The fact that statutes were passed plainly shows that there were either doubts as to what the law was, or a lack of vigor in enforcing it.

MERELY DECLARATORY.—The statute of 13 Eliz. c. 5[2] is the last in the series, and is the foundation of all the modern law of fraudulent conveyances. It was extended to Ireland by 10 Car. I, sess. 2, cap. 3, and is in force in Maine, New Hampshire, Massachusetts, Delaware, Pennsylvania, Maryland, and Iowa. The various statutes in the other States are modeled after it, and in the main are simply a re-enactment of it. In this respect the development of the Anglican law presents an analogy to the Roman law. Roman law was founded upon an edict of the prætor; Anglican law is founded upon a legislative enactment. This statute, however, is merely declaratory of the common law.[3] By this expression the courts probably do not mean to say more than that the statute is founded in common reason, and common reason has justly been held to be common law.[4] As far as the actual prac-

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[1] Lyte v. Perry, Dyer, 49 C. [2] Made perpetual by 29 Eliz. c. 5.

[3] Co. Litt. 76, a. 290 c.; Twyne's Case, 3 Co. 80; Moore, 638; Hamilton v. Russell, 1 Cranch, 309; Peck v. Land, 2 Geo. 1; Clements v. Moore, 6 Wall. 299; Hudnal v. Wilder, 4 McCord, 294; 1 McCord, 227.

[4] 27 H. VIII, fol. 10.

tice was concerned, it probably would be more strictly accurate to say that the principles of the common law, as now understood, are so strong against fraud in every shape that they will attain every end proposed by the statute.[1]

COMMON LAW STILL IN FORCE.—This doctrine is of practical importance, for unless there is a conflict between the provisions of a statute and those of the common law relating to the same subject-matter, or an evident intent of the legislature to repeal the common law, the latter is considered to be still in force. Consequently, as the act is merely declaratory, resort may always be had to the principles of the common law whenever the statute fails to reach a case of fraud.[2] The act itself is not affected by this doctrine,[3] and will in general be received as a true declaration of what the law was;[4] but wherever the statute is ineffective, either through a change of custom, or the introduction of a new kind of property, or the concoction of some new device, there the common law intervenes with its pure and elevated principles of morality and justice, and enforces the dictates of common honesty and common sense. In other words, the common law supplements the statute, to the end that justice may be done and every species of fraud suppressed.

LIBERAL CONSTRUCTION.—The statute is established for the suppression of fraud, the advancement of justice, and the promotion of the public good. Consequently, it

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[1] Cadogan v. Kennett, 2 Cowp. 432.

[2] Blackman v. Wheaton, 13 Minn. 326; Fox v. Hills, 1 Conn. 295; State v. Fife, 2 Bailey, 337; Lillard v. M'Gee, 4 Bibb, 165; Westmoreland v. Powells, 59 Geo. 256.

[3] Davis v. Turner, 4 Gratt. 422. [4] Clark v. Douglass, 62 Penn. 408.

should be liberally and beneficially construed to suppress the fraud, abridge the mischief, and enlarge the remedy.[1] It must not, however, be so strained as to make it receive an interpretation which it was not intended to bear. Such a construction, moreover, is not to be made in support of creditors as will make third persons sufferers when they act in good faith.[2] These principles are adopted in all the cases, and run through every branch of the law of fraudulent conveyances. The statute receives a fair and liberal construction to carry out the plain intent of the legislature, yet interpretation is not carried to such an extreme as to warp it from its true meaning. Rather than give a strained construction to any part of it, the courts prefer to go back to the liberal principles of the common law. In this mode the will of the legislature is carried out, and the principles of the law modified to meet the varying wants of a progressive civilization.

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[1] Twyne's Case, 3 Co. 80; Moore, 638; Gooch's Case, 5 Co. 60; Cadogan v. Kennett, 2 Cowp. 432; McCulloch v. Hutchinson, 7 Watts, 434.

[2] Cadogan v. Kennett, 2 Cowp. 432.

CHAPTER II.

WHAT CONSTITUTES A FRAUDULENT CONVEYANCE.

OWNER'S ABSOLUTE DOMINION OVER HIS PROPERTY.—Every one has the absolute dominion over his own property, and by virtue of that dominion, when he is under no obligation in respect to it, he may, according to his own good will and pleasure, and within the limits prescribed by law, make any disposition of it which does not interfere with the existing rights of others.[1] He may sell it, or give it to others. If he sells it, he may exercise the most liberal and extended discretion as to the time and manner of disposing of it, and investing the proceeds. He may contract debts to be satisfied out of it, confess judgments and create liens upon it.[2] The power of courts of justice to interfere with, or in any manner control such disposition, exists only when the right is exercised to the prejudice of third persons. In other respects he may act according to the dictates of his pleasure, interest, or even caprice.[3]

OWNER'S ABSOLUTE DOMINION NOT DIVESTED BY INDEBTEDNESS.—He is not deprived of his power and dominion over his property by either indebtedness or even insolvency, for his obligation is purely personal, and does not

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[1] Sexton v. Wheaton, 8 Wheat, 229; Thomson v. Dougherty, 12 S. & R. 448.

[2] Candee v. Lord, 2 N. Y. 269.

[3] Pope v. Wilson, 7 Ala. 690.

affect his property.[1] His creditors have no right to insist that his resources shall remain in any given shape. He may exchange his property for other property, or sell it and apply the proceeds, in his discretion, to his debts, his purchases, or his maintenance. He has the right to manage, control, mortgage, pledge, and deal with it, and enter into business contracts in relation to it, in such way and manner as he deems will best conduce to its preservation and increase.[2] He may enter into a partnership, transferring a part or even the whole of his property to the firm.[3] If he is prosecuting an action of ejectment, he may compromise with his adversary in any manner he thinks proper.[4] Simple insolvency does not work a dissolution of a partnership, or divest the partners of their dominion over the partnership property.[5] General creditors have no authority to control the exercise of this dominion over the property, and can only resort to the personal remedies given by law for the coercion of payment.[6]

Debtor held to the Exercise of Good Faith.—A debtor, however, is not merely the owner. He sustains two distinct relations to his property, that of owner and *quasi* trustee for his creditors.[7] If they take no specific security from him, they trust him upon the general credit of his property, and a confidence that he will not diminish

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[1] Frank v. Peters, 9 Ind. 344; Waddams v. Humphreys, 22 Ill. 661; Barrow v. Bailey, 5 Fla. 9.

[2] Davis v. Turner, 4 Gratt. 422; Paper Works v. Willet, 1 Robt. 131; Stanley v. Robbins, 36 Vt. 422; Frank v. Levie, 5 Robt. 599; Carter v. Neal, 24 Geo. 346.

[3] Browne v. Ripka, 12 Pitts. L. J. 170.

[4] Richardson v. Stewart, 2 S. & R. 84.

[5] Siegel v. Chidsey, 28 Penn. 279. [6] Davis v. Turner, 4 Gratt. 422.

[7] Candee v. Lord, 2 N. Y. 269.

it to their prejudice. They, therefore, have an equitable claim upon and interest in it.[1] The law lays upon him an obligation to pay his debts, and holds him in behalf of his creditors to the exercise of good faith in all transactions relating to the fund upon which they must depend for payment. He must, therefore, exercise his dominion over his property fairly and honestly with reference to the rights of his creditors to be paid out of the same, and without any view or intention of delaying, hindering, or preventing them from obtaining their lawful dues and demands. Wherever he exceeds these limits of his legitimate authority and power over his property and funds, the exercise of the power becomes unconscientious and inequitable, and the law then controls and regulates it in such a manner as to compel him to do justice to his creditors. Such an unconscientious exercise of power by a debtor is considered a fraud upon his creditors.[2] He can, therefore, neither create a debt, nor do any of the things hereinbefore mentioned *mala fide* to their prejudice, and if he does, the act is liable to be impeached.

Owner's Absolute Dominion involves the Right of Another to Purchase.—His right to sell, or otherwise dispose of his property, involves the corresponding right of another to purchase or receive it.[3] The only limitation upon the exercise of these rights is that the transfer shall be in good faith. The right of creditors to impeach an act of the debtor does not arise until the latter violates the confidence reposed in him at the time of the creation of the debt, but any violation of this is a fraud

[1] Eppes v. Randolph, 2 Call. 103; Seymour v. Wilson, 19 N. Y. 417.
[2] Weed v. Pierce, 9 Cow. 722; Pope v. Wilson, 7 Ala. 690.
[3] Barrow v. Bailey. 5 Fla. 9.

upon their rights. If another receives the property with notice of the fraud, he is aiding the debtor to cheat his creditors, and this the law never tolerates.[1] A person desiring to purchase, however, has a right to trust to the debtor's dominion over his property, and if he purchases in good faith for a valuable consideration, he should be protected. Having parted with his money in good faith, he holds the legal title, and has an equal equity with the creditors, and, consequently, has a paramount right to retain the property.[2]

THE ELEMENTS OF A FRAUDULENT CONVEYANCE.—The statute is founded upon these principles. It invalidates all transfers made "to the end, purpose, and intent to delay, hinder, or defraud creditors," but protects all "estates or interests which are conveyed on good consideration and *bona fide*." An inquiry into the validity of a transfer under the statute, therefore, involves three points: the existence of an intent to delay, hinder, or defraud, the consideration, and the *bona fides* of the transfer.

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[1] Cadogan v. Kennett, 2 Cowp. 432.

[2] Eppes v. Randolph, 2 Call. 103; Seymour v. Wilson, 19 N. Y. 417.

CHAPTER III.

FRAUDULENT INTENT.

THE CHARACTER OF INTENT.—The statute renders void all feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions which are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs. It will be observed that there is no other description of the intent in the enacting clause except by reference to the preamble "the intent before declared and expressed."[1] This reference however, makes the intent essential to invalidate the transaction, by thus incorporating it in the body of the statute. The introduction of the term "purpose" into the act does not impart to it any additional potency. It is only a synonym for design, intention—a mere expletive, intended to convey the idea which the legislature had in view more strikingly, and might be stricken from the act without affecting its interpretation in any manner.[2]

WHAT KIND OF FRAUD IS WITHIN THE STATUTE.—No fraud is within the statute unless it is directed against those who have just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries,

[1] Walker v. Burrows, 1 Atk. 93. [2] Anderson v. Hooks, 9 Ala. 704.

or reliefs. An intent to deceive and defraud the public, without any intent to delay, hinder or defraud the creditors of the grantor, is not such a fraud.[1] Nor is a fraud which is directed against the debtor and not against his creditors within the act. The creditors of a party defrauded have no right, even though the fraud has the effect to diminish his means of paying them, to look into such fraud or unravel it. It is for him and him alone to do so, and if he chooses to acquiesce in the fraud, or suffers himself to be concluded of his right to investigate or undo it, his creditors must be content to abide by the legal rights remaining in him. There is a manifest distinction between a fraud upon the debtor and a fraud upon creditors. In the one case the debtor is the victim and guilty of no wrong, while in the other he is himself either in fact or in law the perpetrator of the fraud. In the latter case the creditors who seek to avoid a sale or transfer do not represent the debtor, but exercise rights paramount to his. In the former case the remedy belongs to the debtor alone, and they can not interfere when they are not in the contemplation of the author of the wrong, and are only affected consequentially.[2] The fraud, moreover, must be a fraud against general creditors, and not a mere intent to defeat a prior unrecorded deed.[3] It must also lie in the transfer, and not in the creation of the debt of the creditor who impeaches it.[4] The fraudulent intent must also be an intent to commit a fraud on creditors by making the trans-

[1] Griffin v. Stoddard, 12 Ala. 783.

[2] Pettus v. Smith, 4 Rich. Eq. 197; Garretson v. Kane, 27 N. J. 208; Eaton v. Perry, 29 Mo. 96; Hovey v. Holcomb, 11 Ill. 660; Prosser v. Edmonds, 1 Y. & C. 481; Graham v. Railroad Co. 102 U. S. 148; McAlpine v. Sweetzer, 76 Ind. 78; vide Van Deusen v. Frink, 36 Mass. 449.

[3] Burgin v. Burgin, 1 Ired. 453.

[4] Horwitz v. Ellinger, 31 Md. 492; Mattison v. Demarest, 4 Robt. 161.

fer, and not by some entirely independent act which might and probably would have been done had no transfer been made.[1]

WHAT CONSTITUTES FRAUD.—Fraud consists of unlawful conduct that operates prejudicially upon the rights of others.[2] To defraud is to withhold from another that which is justly due to him, or to deprive him of a right by deception or artifice.[3] A fraud upon creditors consists in the intention to prevent them from recovering their just debts, by an act which withdraws the property of the debtor from their reach.[4] There can be no fraud without a dishonest intent; but fraud does not consist in mere intention, but in intention carried out by hurtful acts. It consists of conduct that operates prejudicially on the rights of others, and is so intended. Mere intention, if not carried out, can not work injury to the rights of others.[5]

DELAY AND HINDERANCE.—It is not necessary, however, that there should be an intent to defraud in order to render a transfer void. The statute makes void all conveyances made with "intent to delay, hinder or defraud creditors." This language implies that the intent to defraud is something distinct from the mere intent to delay or hinder, and that the latter alone will vitiate a transfer.[6]

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[1] Wilson v. Forsyth, 24 Barb. 105. [2] Bunn v. Ahl, 29 Penn. 387.

[3] Burdick v. Post, 12 Barb. 168; s. c. 6 N. Y. 522.

[4] McKibbin v. Martin, 64 Penn. 352; Ala Ins. Co. v. Pettway, 24 Ala. 544.

[5] Bunn v. Ahl, 29 Penn. 387; Williams v. Davis, 69 Penn. 21; Rice v. Perry, 61 Me. 145,

[6] Pilling v. Otis, 13 Wis. 495; Planck v. Schermerhorn, 3 Barb Ch. 644; Sutton v. Hanford, 11 Mich. 513; Davenport v. Cummings, 15 Iowa, 219; Burt v. McKinstry, 4 Minn. 204; Burgert v. Borchert, 59 Mo. 80; Crow v. Beardsley, 68 Mo. 435; Planters' Bank v. Willeo Mills, 60 Geo. 168; Dunaway v. Robertson, 95 Ill. 419; Cordes v. Straszer, 8 Mo. Ap. 61.

The term fraud imports something of a more vicious character than the mere production of a delay of satisfaction. There is no distinction, however, between delaying and hindering. A person who is hindered is effectually delayed. To hinder any one in his course is necessarily to delay him. Many such pleonasms are to be found in the old English statutes, where they were introduced for caution's sake more than with any precise idea as to what they were intended to effect.[1]

What constitutes a Hinderance or Delay.—The term delay refers not merely to time, but to the interposition of obstacles in the way of creditors, with the fraudulent intent to hinder and delay.[2] The statute is to be construed according to its reasonable intent and object, and by a reasonable construction only such hinderance and delay as will operate as a fraud come within its operation.[3] A delay for all time renders a transfer void, and the principle is the same when it is sought for a limited time. The difference is in degree only. The hinderance or delay of creditors is reprobated by the statute without regard to the duration of the hinderance or delay.[4] The time for the performance of a contract is both in morals and in law an essential part of the contract itself, and a debtor who attempts to postpone the time of payment, endeavors to deprive his creditors of a valuable right, and thus it may justly be said that a positive intent to defraud always exists where the inducement to a conveyance is to hinder and delay credi-

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[1] Read v. Worthington, 9 Bosw. 617; Burdick v. Post, 12 Barb. 168; s. c. 6 N. Y. 522.

[2] Linn v. Wright, 18 Tex. 317; Hefner v. Metcalf, 1 Head, 577.

[3] Hoffman v. Mackall, 5 Ohio St. 124.

[4] Quarles v. Kerr, 14 Gratt. 48; Sutton v. Hanford, 11 Mich. 513.

tors, since the right of creditors to receive their demands when due is as absolute as their right to receive them at all.[1] Therefore, where the debtor places his property beyond the reach of legal process, so as to delay creditors, this is a legal fraud, although he may intend ultimately to appropriate it for the benefit of all, or a part of them.[2] The law provides a mode for the appropriation of a debtor's property to the payment of his debts, and the interposition of any obstacle to prevent such appropriation in the due course of legal proceedings is a delay and hinderance within the meaning of the statute. The obstacle, however, must be interposed between the creditors and the property of the debtor. If, after a transfer, the property does not, either in fact or contemplation of law, belong to the debtor, or if the interest reserved is merely difficult to reach on account of its peculiar character, then there is no hinderance and delay within the statute. It is for this reason that a preference,[3] or an assignment for the benefit of creditors,[4] may be made for the express purpose of defeating an execution. The creditor may be baffled, or even eventually lose his debt, but there is no obstacle interposed between him and any property which belongs to the debtor.

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[1] Nicholson v. Leavitt, 6 N. Y. 510; s. c. 10 N. Y. 591; s. c. 4 Sandf. 252.

[2] Wheelden v. Wilson, 44 Me. 1; Borland v. Mayo, 8 Ala. 104; Kimball v. Thompson, 58 Mass. 441; Stovall v. Farmers' Bank, 16 Miss. 305; McLean v. Lafayette Bank, 3 McLean, 587.

[3] Holbird v. Anderson, 5 Term R. 235; Wood v. Dixie, 53 E. C. L. 892; s. c. 7 Q. B. 892; Darvill v. Terry, 6 H. & N. 807; Hall v. Arnold, 15 Barb. 599; Hartshorne v. Eames, 31 Me. 93; Gassett v. Wilson, 3 Fla. 235; Wheaton v. Neville, 19 Cal. 41.

[4] Riches v. Evans, 9 C. & P. 640; Johnson v. Osenton, L. R. 4 Ex. 107; Wilt v. Franklin, 1 Binn. 502; Jackson v. Cornell, 1 Sandf. Ch. 348; Horwitz v. Ellinger, 31 Md. 492.

How the Fraudulent Intent is ascertained.—The test words by which the validity of a transfer is tried are, "to the end, purpose, and intent to hinder, delay or defraud" The presence of this intent is essential to render a conveyance void.[1] The transfer must also be "devised and contrived of malice, fraud, covin, collusion or guile," and the intent must be marked by these characters or one of them.[2] Every contrivance, however, to the intent to delay, hinder or defraud creditors is malicious. If the hinderance of creditors forms any part of the actual intent of the act done, so far the act is as against them a malicious contrivance.[3] In some cases the inference of fraud is a mere question of fact, and being a question of fact, can only be found by the tribunal which determines questions of fact.[4] When the existence of the fraudulent intent is thus a question of fact, it must, in an action at law, be expressly found by the jury, for the court cannot infer it.[5] When fraud is thus a question of fact, it is called actual fraud, or fraud in fact.

Fraud in Law.—The existence of the fraudulent intent is not, however, always a question of fact. It is sometimes a question of law. Every man is presumed to intend the

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[1] Sibly v. Hood, 3 Mo. 290.

[2] Ewing v. Runkle, 20 Ill. 448; Meux. v. Howell, 4 East. 1.

[3] Hafner v. Irwin, 1 Ired. 490.

[4] Allen v. Wheeler, 70 Mass. 123; Ewing v. Gray, 12 Ind. 64; Maples v. Burnside, 22 Ind. 139; Banfield v. Whipple, 96 Mass. 13; Green v. Tanner, 49 Mass. 411; Bagg v. Jerome, 7 Mich. 145; Jackson v. Mather, 7 Cow. 301; Nicol v. Crittenden, 55 Geo. 497; Williams v. Evans, 6 Neb. 216.

[5] Tyrer v. Littleton, 2 Brownl. 187; Crisp v. Pratt, Cro. Car. 549; Oxford's Case, 10 Co. 53 b.; Seward v. Jackson, 8 Cow. 406; s. c. 5 Cow. 67; Ridler v. Punter, Cro. Eliz. 291; Marden v. Babcock, 43 Mass. 99; Ridgway v. Ogden, 4 Wash. C. C. 139; Charlton v. Gardner, 11 Leigh, 281; Ehrisman v. Roberts, 68 Penn. 308; Monteith v. Bax, 4 Neb. 166; Kelly v. Lenihan, 56 Ind. 448; Tognini v. Kyle, 15 Nev. 464.

necessary consequence of his act, and if an act necessarily delays, hinders or defrauds creditors, then the law presumes that it is done with a fraudulent intent.[1] If the law adjudges the effect to be to delay, hinder, or defraud creditors, then the transfer is to be regarded as fraudulent, though this may not have been the intention of the parties.[2] If, for instance, an insolvent debtor gives away a part of his property, the inevitable effect of the act, if it were allowed to stand, would be to deprive his creditors of the means of enforcing payment, and hence, in such a case, the intent to defraud is a conclusion of law arising from his conduct.[3] The legal effect of a written instrument is also a question of law, and the intent of the parties in making it may be gathered from its face, and where the natural and inevitable consequence of its provisions is to delay, hinder or defraud creditors, it is void as a conclusion of law.[4] In some cases, moreover, the point may be raised by the pleadings, for when the facts on which the fraud depends are well pleaded on one side and admitted by demurrer or otherwise upon the other, the existence of the fraudulent intent is also a question of law.[5] To justify the inference of a fraudulent intent, however, when no fraud in

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[1] Babcock v. Eckler, 24 N. Y. 623; Potter v. McDowell, 31 Mo. 62; O'Connor v. Bernard, 2 Jones, 654; Freeman v. Pope, L. R. 5 Ch. 538; s. c. L. R. 9 Eq. 206; Norton v. Norton, 59 Mass. 524; Freeman v. Burnham, 36 Conn. 469.

[2] Bentz v. Riley, 69 Penn. 71.

[3] Babcock v. Eckler, 24 N. Y. 623; Potter v. McDowell, 31 Mo. 62.

[4] Mitchell v. Beal, 8 Yerg. 134; Ashurst v. Martin, 9 Port, 566; Sheldon v. Dodge, 4 Denio, 217; Griffin v. Cranston, 10 Bosw. 1; s. c. 1 Bosw. 281; Young v. Booe, 11 Ired. 347; Johnson v. Thweatt, 18 Ala. 741; Bigelow v. Stringer, 40 Mo. 195; Gere v. Murray, 6 Minn. 305; Goodrich v. Downs, 6 Hill. 438; Bartels v. Harris, 4 Me. 146; Harmau v. Hoskins, 56 Miss. 142.

[5] Gerrish v. Mace, 75 Mass. 250.

fact is proved, there must be creditors who may be delayed, hindered or defrauded, and the necessary consequences of the act must be to produce such delay, hinderance or fraud.[1] In the construction of written instruments, also, the existence of fraud is a question of fact whenever their terms and stipulations are by possibility compatible with good faith, and have upon their face the essential elements of a legal contract.[2] Whenever fraud is thus the inevitable consequence of an act or instrument, it is called constructive fraud, or fraud in law.[3] A constructive fraud is an act which the law declares to be fraudulent without inquiring into the motive, not because arbitrary rules have been laid down upon this subject, but because certain acts carry in themselves irresistible evidence of fraud.[4]

No Difference between Fraud in Fact and Fraud in Law.—There is no difference in principle between fraud in fact and fraud in law. Where the direct and inevitable consequence of an act is to delay, hinder or defraud creditors, the presumption at once conclusively arises, that such illegal object furnished one of the motives for doing it, and it is thus upon this ground held to be fraudulent. The result is the same when the illegal design is established as a question of fact. The inquiry is as to the intention of the debtor. When it appears that among the inducements operating upon him, there is an intention to violate any of the duties owing by him to any of his creditors, the transfer is tainted and may be set aside at the suit of any creditor.[5]

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[1] Pope v. Wilson, 7 Ala. 690; State v. Estel, 6 Mo. Ap. 6.

[2] Jones v. Huggeford, 44 Mass. 515; Hastings v. Baldwin, 17 Mass. 552; Williams v. Anderson, 6 Neb. 392.

[3] Lukins v. Aird, 6 Wall. 78. [4] M'Broom v. Rives, 1 Stew. 72.

[5] Oliver Lee & Co.'s Bank v. Talcott, 19 N. Y. 146; Gere v. Murray, 6 Minn. 305.

LEGAL, NOT MORAL INTENT.—The statute refers to a legal and not a moral intent, for one man's right does not depend on another man's moral sense. The moral sense is much stronger in some men than in others. The statute, therefore, supposes that every one is capable of perceiving what is wrong, and if he does what is forbidden, intending to do it, he is not allowed to say that he did not intend to do a forbidden act. A man's moral perceptions may be so perverted as to imagine an act to be fair and honest which the law justly pronounces fraudulent and corrupt; but he is not, therefore, to escape from the consequences of it. The law must have a more certain standard for measuring men's intents than each individual's varying and capricious notions of right and wrong. Whatever a man's opinions of his own acts may be, there are certain rules founded in experience and established by law for determining the validity of transfers under the statute, and if these rules are transgressed, they are void, without regard to the opinion of the parties to it.[1] Fraud, therefore, does not necessarily impute a corrupt or dishonorable motive. Parties may do what they consider perfectly fair, for the purpose of preventing a sacrifice merely, and with the intention of paying all the creditors ultimately, or may be animated merely by motives of affection or compassion;[2] but the law does not sanction any contrivance for either defeating or delaying creditors,[3] and invalidates it without regard to the motives of the parties.

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[1] Potter v. McDowell, 31 Mo. 62; Grover v. Wakeman, 11 Wend. 187; s. c. 4 Paige, 23.

[2] Sturdivant v. Davis, 9 Ired. 365; Gardiner Bank v. Wheaton, 8 Me. 373; Briggs v. Mitchell, 60 Barb. 288; Trimble v. Turner, 21 Miss. 348; Flood v. Prettyman, 24 Ill. 596.

[3] Enders v. Swayne, 8 Dana, 103.

Fraud as a Question of Law.—It follows, therefore, that what constitutes fraud is a question of law. It is the judgment of law upon facts and intents.[1] Fraud is expressive of a legal idea, and admits of a legal definition. It is, therefore, a matter of law. The expression that when there is no dispute about the facts, fraud is a question of law,[2] is not strictly accurate, for the intent is a material fact,[3] and this is not in all cases an inference of law. But when the intent is ascertained, the law pronounces whether it is fraudulent and covinous.[4] Whenever the transfer is tainted with actual and not constructive fraud, it is the province of the tribunal for the ascertainment of facts to find the actual intent. In that sense, fraud is sometimes called a mixed question of law and fact.[5] But it is never exclusively one of fact. It has never been held that the jury may give to the intentions such effect as to them may seem proper in each case. That the law declares, and the security of creditors depends upon the fixed principles of the law, and not on the uncertain judgment of jurors as to what is fraud.[6] In actions of law, therefore, it is the province of the court to instruct the jury as to what intent is in law fraudulent, and to inform them whether certain evidence has a tendency to prove it.[7]

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[1] Worseley v. De Mattos, 1 Burr. 467; Sturtevant v. Ballard, 9 Johns. 337; Planters' Bank v. Borland, 5 Ala. 531.

[2] Sturtevant v. Ballard, 9 Johns. 337; Divver v. McLaughlin, 2 Wend. 596.

[3] Geigler v. Maddox, 28 Mo. 575.

[4] Gere v. Murray, 6 Minn. 305; Gregory v. Perkins, 4 Dev. 50; Hardy v. Simpson, 13 Ired. 132; Kean v. Newell, 2 Mo. 9.

[5] Wilson v. Lott, 5 Fla. 305; Hall v. Tuttle, 8 Wend. 375; Haven v. Low, 2 N. H. 13; McLaughlin v. Bank of Potomac, 7 How. 220; Dodd v. McCraw, 8 Ark. 83; Means v. Feaster, 4 Rich. (N. S.) 249.

[6] Gregory v. Perkins, 4 Dev. 50.

[7] Leadman v. Harris, 3 Dev. 144; Mott v. McNeal, 1 Aik. 162; Dur-

ESTABLISHMENT OF INTENT.—The intent which under the statute avoids the transfer as to creditors is an intent to delay, hinder or defraud, and the existence of the particular intent must be established before the transfer can be set aside. But it is not essential to establish any formal or premeditated design to accomplish the illegal purpose. It is enough to establish, either directly or indirectly, that the participators in the transaction were actuated by an intent which the law respecting fraudulent conveyances inhibits.[1] This intent must in general be the intent of the debtor, and not that of some third person. But if the maker has no intent of his own in doing the act, being a mere passive instrument in the hands of his agent, and executing it merely to enable the agent to accomplish some purpose of his own, that purpose becomes the intention of the maker, although no inquiry is made or knowledge obtained as to such design. The objects are his, the frauds are his, and he is responsible therefor, however destitute of any knowledge thereof.[2]

INTENT TO PREVENT A SACRIFICE.—The mere intent to prevent a sacrifice of the property is not sufficient to render a conveyance void.[3] But if the intent to prevent a sacrifice of the property is accompanied with the requisite intent to delay, hinder or defraud creditors, then the transaction is fraudulent and void.[4]

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key v. Mahoney, 1 Aik. 116; Gibson v. Love, 4 Fla. 217; Smith v. Henry, 2 Bailey, 118; s. c. 1 Hill, 16; Babb v. Clemson, 12 S. & R. 328; Cadbury v. Nolen, 5 Penn. 320; vide Kane v. Drake, 27 Ind. 29; Wynne v. Gildewell, 17 Ind. 446.

[1] Burgert v. Borchert, 59 Mo. 80; Hilliard v. Cagle, 46 Miss. 309.

[2] Warner v. Warren, 46 N. Y. 228.

[3] Cason v. Murray, 15 Mo. 378.

[4] Brown v. Osgood, 25 Me. 505; Boarland v. Mayo, 8 Ala. 104.

ACCIDENT.—Accident or mistake can not in general be deemed sufficient to render any one guilty of fraud;[1] but the parties to a written instrument are conclusively presumed to intend what is expressed upon its face, and if its terms are fraudulent, it cannot be supported by proof that they were inserted through inadvertence or mistake.[2]

NOT A QUESTION OF REMEDY.—The validity of a transfer depends upon the intent of the debtor in making it, and not upon the question whether a remedy is or is not open to creditors. If it is made with the intent to delay, hinder, or defraud creditors, it can not be sustained by showing that a remedy is open to them.[3]

FRAUD MUST BE IN THE BEGINNING.—As fraud depends upon the intent of the debtor, it must be in the inception of the transfer,[4] and is the same in the smallest as in the largest transactions.[5]

VOID AS TO ONE, VOID AS TO ALL.—If there is an intent to delay, hinder, or defraud a particular creditor, it is not necessary to establish an intent to delay, hinder, or defraud all creditors.[6] It is not, on the other hand, necessary to establish a specific design to delay, hinder or defraud the

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[1] Runyon v. Leary, 4 Dev. & Bat. 231; Fuller v. Acker, 1 Hill, 473.

[2] August v. Seeskind, 6 Cold. 166; Hooper v. Tuckerman, 3 Sandf. 311.

[3] Grover v. Wakeman, 11 Wend. 187; s. c. 4 Paige, 23; Hyslop v. Clarke, 14 Johns. 458; Halsey v. Whitney, 4 Mason, 206; Greeu v. Trieber, 3 Md. 11; Galt v. Dibrell, 10 Yerg. 146.

[4] Stone v. Grubbam, 2 Bulst. 217; s. c. 1 Rol. Rep. 3; Shep. Touch. 66; Weller v. Wayland, 17 Johns. 102; Claytor v. Anthony, 6 Rand. 285; Sommerville v. Hortou, 4 Yerg. 541; Pope v. Wilson, 7 Ala. 690; Ray v. Simons, 76 Ind. 150; Rose v. Colter, 76 Ind. 590.

[5] State v. Benoist, 37 Mo. 500.

[6] Allen v. Kingon, 41 Mich. 281.

particular creditor who assails the transfer, for the intent to delay, hinder, or defraud one creditor renders the transfer void as to all.[1] It has never been determined to be necessary in order to make a transfer void that any creditor should be actually hindered or delayed. The statute speaks of those who may be hindered.[2]

CORPORATIONS.—A Corporation may in judgment of law intend to defraud creditors.[3]

OTHER MOTIVE.—If the object is to delay, hinder or defraud creditors, the transfer will not be purged because the debtor may also have some other purpose in view.[4]

BENEFIT OF GRANTOR.—If a transfer is made with the intent to delay, hinder, or defraud creditors, it is void whether it is made for the benefit of the debtor or not.[5]

ACT AUTHORIZED BY STATUTE.—Acts which are done in pursuance of a statute cannot be deemed fraudulent, for the statute is enacted by the power that made the law of fraud, and can therefore with equal power unmake that law.[6]

A FRAUDULENT TRANSFER NOT NECESSARILY FICTITIOUS.—In a fraudulent conveyance there is generally an

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[1] Turbervill v. Tipper, Palm. 415, note; Rex v. Nottinghan, Lane, 42; Warneford's Case, Dyer, 193, 267; Winer v. Warner, 2 Grant, 448; Hoke v. Henderson, 3 Dev. 12; Gruber v. Boyles, 1 Brev. 266; Dardenne v. Hardwick, 9 Ark. 482; Warner v. Percy, 22 Vt. 155; Bodine v. Simmons, 38 Mich. 682; vide Wilson v. Fuller, 9 Kans. 176.

[2] Richardson v. Smallwood, Jac. 552; Main v. Lynch, 47 Md. 658.

[3] Curtis v. Leavitt, 15 N. Y. 9; s. c. 17 Barb. 309; Smith v. Morse, 2 Cal. 524.

[4] Reed v. Noxon, 48 Ill. 323.

[5] Barkow v. Sanger, 47 Wis. 500.

[6] State v. Curran, 12 Ark. 321.

intention to secure some interest in the property to the debtor, or some future right in it to the prejudice of the creditors,[1] and therefore it is sometimes said that a fraudulent instrument is one which the parties do not intend to carry out as a real instrument according to its apparent character and effect.[2] *Dolus est machinatio cum aliud dissimulat aliud agit.*[3] It is manifest, however, that an instrument may be fraudulent, although it is intended to operate as a real transfer, as in the case of a voluntary conveyance by an insolvent debtor. A feigned conveyance is a fraudulent conveyance, but a fraudulent conveyance is not necessarily fictitious.

VERDICT NOT CONCLUSIVE.—The verdict of a jury upon a question of fraud is not conclusive, but may be set aside the same as in any other case.[4]

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[1] Northampton Bank v. Whiting, 12 Mass. 104; Belmont v. Lane, 22 How. Pr. 365.

[2] Eveleigh v. Purrsford, 2 Mood. & Rob. 539; Doe v. Routledge, Cowp. 705.

[3] Rex v. Nottingham, Lane, 42.

[4] Dodd v. McCraw, 8 Ark. 83; Vance v. Phillips, 6 Hill, 433; Potter v. Payne, 21 Conn. 361; Marston v. Vultee, 12 Abb. Pr. 143; Edwards v. Currier, 43 Me. 474; Weisiger v. Chisholm, 28 Tex. 780; 22 Tex. 670.

CHAPTER IV.

BADGES OF FRAUD.

THE TERM "BADGES OF FRAUD" EXPLAINED.—A badge of fraud is sometimes called a sign of fraud,[1] a mark of fraud,[2] a circumstance of fraud,[3] an evidence of fraud,[4] and an argument of fraud.[5] These terms are all synonymous, and simply denote an act which has a fraudulent aspect. An intent to defraud is an emotion of the mind, and as fraud is usually hatched in secret, *in arbore cava et opaca*, there are generally no means of ascertaining whether it exists, except by observing the acts of the parties engaged in any transaction, and deducing the intent from those in accordance with certain principles which have been established by observation and experience. A badge of fraud is simply an inference drawn by experience from the customary conduct of mankind.[6] The law adopts and acts upon the known principles of human action. A badge of fraud may therefore be defined as a fact calculated to throw suspicion upon a transaction, and calling for an explanation.[7] Its only effect in general is to require a more stringent proof of the consideration for the transfer and the good faith of the parties than would be demanded where no such suspicion of unfairness exists.[8]

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[1] Twyne's Case, 3 Mo. 80; Moore, 638.

[2] Twyne's Case, 3 Mo. 80; Moore, 638.

[3] Cadogan v. Kennett, 2 Cowp. 432.

[4] Cadogan v. Kennett, 2 Cowp. 432.

[5] Cadogan v. Kennett, 2 Cowp. 432. [6] Terrell v. Green, 11 Ala. 207.

[7] Peebles v. Horton, 64 N. C. 374; Pilling v. Otis, 13 Wis. 495; Sherman v. Hogland, 73 Ind. 472.

[8] Terrell v. Green, 11 Ala. 207.

WHY AN ACT IS A BADGE OF FRAUD.—The reason why any fact is denominated a badge of fraud is either because its natural and probable tendency is to delay, hinder, or defraud creditors, or because it is not in the usual course in which men acting in good faith transact business. The first ground rests upon the principle that every man is presumed to intend the natural and probable consequence of his act; the second ground is the result of experience. Whatever is out of the usual course betrays contrivance to give color to the transaction.[1] If the departure from the usual course of business consists in an attempt to conceal, it constitutes secrecy, which is an ordinary badge of fraud. If it consists in an excess of precaution, it looks as though it may have been for effect to give the semblance of reality to that which is fictitious.[2] It evinces a diffidence in the rectitude of the transaction, and a correspondent solicitude to provide defenses.[3] Whatever may be the form it assumes, it always excites suspicion, for an assumed act is generally prompted by some unusual motive. When men's designs are correct, they are usually content to carry them into effect in the usual mode.[4] To raise such a suspicion, however, upon this ground, it is not sufficient that the transfer shall be out of the ordinary course of the debtor's business, but it must be out of the usual course in which men commonly make such transfers.[5]

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[1] Sands v. Codwise, 4 Johns. 536; Borland v. Walker, 7 Ala. 269; Kempner v. Churchill, 8 Wall. 362; Sayre v. Fredericks, 16 N. J. Eq. 205; Poague v. Boyce, 6 J. J. Marsh, 70; Godfrey v. Germain, 24 Wis. 410; Rothberger v. Gough, 52 Ill. 436.

[2] Comstock v. Rayford, 20 Miss. 369, S. C. 9 Miss. 423.

[3] Sands v. Codwise, 4 Johns. 536.

[4] Potter v. McDowell, 31 Mo. 62.

[5] Derby v. Gallup, 5 Minn. 119; Hathaway v. Brown, 18 Minn. 414.

ALL BADGES OF FRAUD NOT OF EQUAL WEIGHT.—All badges of fraud are not, however, entitled to equal weight as evidence. One may be almost conclusive, and another may furnish merely a reasonable inference of fraud, yet both would be badges of fraud. The books accordingly speak of strong badges and slight badges of fraud, meaning by the word "badge" nothing more than that the fact relied on has a tendency to show fraud, but leaving its greater or less effect to depend on its intrinsic character.[1] There is not, moreover, any ascertained rule of law which fixes and determines what acts or declarations of a party shall in all cases be required to establish fraud; but, on the contrary, the badges of fraud may, and often do, vary according to the intellectual character and moral depravity of the perpetrator, the end designed to be attained, and the means by which it is to be accomplished.[2]

EFFECT OF A BADGE OF FRAUD.—A badge of fraud does not constitute fraud itself, but is simply evidence of fraud, a means of establishing a fraudulent intent.[3] It is not necessary, however, in order to condemn a transaction as fraudulent, that two or more of the marks of a collusive design shall be affixed to it, for all presumption becomes conclusive unless explained. Any one badge simply will impeach a conveyance, and on the other hand several badges may unite and the transaction still be protected.[4] The concurrence of several badges will, however, always

[1] Pilling v. Otis, 13 Wis. 495.

[2] Richards v. Swan, 7 Gill, 366; 2 Md. Ch. 111; Schaferman v. O'Brien, 28 Md. 565.

[3] Wilson v. Lott, 5 Fla. 305; Allen v. Wheeler, 70 Mass. 123; Pilling v. Otis, 13 Wis. 495; Hill v. Bowman, 35 Mich. 191; Thomas v. Rembert, 63 Ala. 561.

[4] Peck v. Land, 2 Geo. 1.

make out a strong case, because the concurrence of a number of independent circumstances, each tending to prove a fact, increases and strengthens the probability of its truth.[1]

INSTRUCTIONS TO JURY.—Circumstances which the law considers as badges of fraud only should be submitted to the jury, so that they may draw their own conclusions as to the character of the transaction.[2] But an instruction that fraud may be inferred from certain circumstances, unless the alleged circumstances are of such a character that the law itself raises the presumption, is erroneous.[3] If the circumstances are proper and innocent in themselves, they do not necessarily tend to prove fraud, and an instruction that fraud may be inferred from them should not be given.[4]

NO ENUMERATION POSSIBLE.—The modes of perpetrating fraud are so various, and the circumstances that may indicate a fraudulent intent are so numerous, that it is impossible to anticipate or enumerate all the badges of fraud.[5]

TRANSFER OF ALL.—The tendency *pro tanto* of every transfer that can be made by a debtor is to hinder and delay his creditors, for it diminishes the fund out of which they can enforce payment.[6] A transfer of all the property of the debtor not only diminishes the fund, but is not an

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[1] Smith v. Henry, 2 Bailey, 118; s. c. 1 Hill, 16; Williams v. Barnett, 52 Tex. 130; Thomas v. Rembert, 63 Ala. 561.

[2] King v. Russell, 40 Tex. 124.

[3] Herkelrath v. Stookey, 63 Ill. 486; Leasure v. Colburn, 57 Ind. 274.

[4] Kane v. Drake, 27 Ind. 29.

[5] Phinizy v. Clark, 62 Geo. 623.

[6] Peck v. Land, 2 Geo. 1.

ordinary transaction, and is, therefore, a badge of fraud.[1] *Dolus versatur in universalibus.*[2] The universality of the transfer is a circumstance to be considered in connection with all the other facts of the case. Under some circumstances it raises a violent presumption of fraud, while under other and different circumstances it is but a slight indication of a fraudulent intent.[3] As it is merely a badge of fraud, the transfer will be valid if it is made in good faith, although it includes all the debtor's property.[4] If

[1] Twyne's Case, 3 Co. 80; Moore, 638; Hawkins v. Allston, 4 Ired. Eq. 137; Tubb v. Williams, 7 Humph. 367; Farmers' Bank v. Douglass, 19 Miss. 469; Trimble v. Ratcliff, 9 B. Mon. 511; 12 B. Mon. 32; Bozman v. Draughan, 3 Stew. 243; Rollins v. Mooers, 25 Me. 192; Hord v. Rust, 4 Bibb, 231; Lewis v. Love, 2 B. Mon. 345; Venable v. Bank, 2 Pet. 107; Langford v. Fly, 7 Humph. 585; Hartshorne v. Eames, 31 Me. 93; Bean v. Smith, 2 Mason, 252; Harrison v. Campbell, 6 Dana, 263; Enders v. Swayne, 8 Dana, 103; Garland v. Rives, 4 Rand. 282; Pope v. Andrews, 1 S. & M. Ch. 135; Lillard v. McGee, 4 Bibb, 165; Mason v. Baker, 1 A. K. Marsh, 208; Beeler v. Bullitt, 3 A. K. Marsh, 280; Yoder v. Standiford, 7 Mon. 478; Glenn v. Glenn, 17 Iowa, 498; Vandall v. Vandall, 13 Iowa, 247; Adams v. Slater, 19 Ind. 418; Sarle v. Arnold, 7 R. I. 582; Monell v. Sherrick, 54 Ill. 269; Burke v. Murphy, 27 Miss. 167; Wheelden v. Wilson, 44 Me. 1; Bibb v. Baker, 17 B. Mon. 292; Leadman v. Harris, 3 Dev. 144; Kennedy v. Ross, 2 Mills Const. R. (S. C.) 125; Sayre v. Fredericks, 16 N. J. Eq. 205; Chappel v. Clapp, 29 Iowa, 161; Clark v. Wise, 39 How. Pr. 97; Forsyth v. Matthews, 14 Penn. 100; Borland v. Walker, 7 Ala. 269; Barr v. Hatch, 3 Ohio, 527; Parsons v. McKnight, 8 N. H. 35; Borland v. Mayo, 8 Ala. 104; Delaware v. Ensign, 21 Barb. 85; Wilson v. Lott, 5 Fla. 305; Constantine v. Twelves, 29 Ala. 607; Meyer v. Simpson, 21 La. An. 591; Hutchinson v. Kelley, 1 Robt. 123; Oakover v. Pettus, Cas. Temp. Finch, 270; Blow v. Maynard, 2 Leigh, 29; Hinton v. Curtis, 1 Pitts. L. J. 198; Peigne v. Snowden, 1 Dessau, 591; Hughes v. Roper, 42 Tex. 116; Dresher v. Corson, 23 Kans. 313; Fleming v. Hiob, 3 Bradw. 390; Booher v. Worrill, 57 Geo. 235.

[2] Twyne's Case, 3 Co. 80; Moore, 638.

[3] Bigelow v. Doolittle, 36 Wis. 115; Kerr v. Hutchins, 46 Tex. 384.

[4] Alton v. Harrison, L. R. 4 Ch. Ap. 622; Planters' Bank v. Borland, 5 Ala. 531; Borland v. Mayo, 8 Ala. 104; Dardenne v. Hardwicke, 9 Ark. 482; Bank of Georgia v. Higginbottom, 9 Pet. 48.

several distinct transfers are not so closely connected as to constitute one transaction, they do not fall within the rule.[1] A transfer of all the debtor's property does not warrant the inference that the grantee is aware of the debtor's insolvency.[2]

GENERALITIES.—*Dolus versatur in generalibus* is also a recognized maxim of the law.[3] Comprehensive generalities in a deed without any particular specifications are a badge of fraud.[4] Men engaged in real transactions do not commonly deal so loosely. A real purchaser is seldom content with anything short of a precise and unequivocal description.

EMBARRASSMENT.—As every transfer by a debtor tends to diminish the fund from which payment can be enforced, embarrassment and heavy indebtedness are badges of fraud.[5] Indebtedness alone does not, however, deprive a

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[1] Preston v. Griffin, 1 Conn. 393; Scott v. Winship, 20 Geo. 429.

[2] Borland v. Mayo, 8 Ala. 104.

[3] Stone v. Grubbam, 2 Bulst. 217; 1 Rol. Rep. 3.

[4] Duvall v. Waters, 1 Bland, 569; s. c. 11 G. & J. 37; Delaware v. Ensign, 21 Barb. 85; Gardner v. McEwen, 19 N. Y. 123; Conkling v. Shelley, 28 N. Y. 360; McCain v. Wood, 4 Ala. 258; Lang v. Lee, 3 Rand. 410; Thompson v. Drake, 3 B. Mon. 565.

[5] Duvall v. Waters, 11 G. & J. 37; s. c. 1 Bland, 569; Durkee v. Mahoney, 1 Aik. 116; Tavenner v. Robinson, 2 Rob. 280; Borland v. Walker, 7 Ala. 269; McRea v. Branch Bank, 19 How. 376; Hudgins v. Kemp, 20 How. 45; Callan v. Statham, 23 How. 477; Chappel v. Clapp, 29 Iowa, 161; Borland v. Mayo, 8 Ala. 104; Gibbs v. Thompson, 7 Humph. 179; Comstock v. Rayford, 20 Miss. 369; 9 Miss. 423; Sayre v. Fredericks, 16 N. J. Eq. 205; Richards v. Swan, 7 Gill, 366; 2 Md. Ch. 111; McNeal v. Glenn, 4 Md. 87; s. c. 3 Md. Ch. 349; Jackson v. Mather, 7 Cow. 301; Phettiplace v. Sayles, 4 Mason, 312; Borland v. Walker, 7 Ala. 269; Merrill v. Lock, 41 N. H. 486; Darden v. Skinner, 2 N. C. L. R. 279; Ringgold v. Waggoner, 14 Ark. 69; Walcott v. Almy, 6 McLean, 23; Barrow v. Bailey, 5 Fla. 9; Satterwhite v. Hicks, Busbee, 105; Overton v. Morris, 3 Port. 249; Planters' Bank v. Walker, 7 Ala. 926; Kinder v. Macy, 7

debtor of his dominion over his property. It is merely a circumstance that causes all his transactions to be scrutinized closely and carefully, for it furnishes a strong motive to make a fraudulent transfer.[1] In order to affect a vendee, however, the indebtedness must be known to him. Vendors generally are indebted, and if sales by an insolvent were void, a vendee would be compelled to obtain an abstract of his vendor's circumstances as well as of his title.[2]

PENDENCY OF SUIT.—The expectation[3] or pendency of a suit is a badge of fraud, because a transfer tends to deprive the creditor of the means of enforcing his judgment when he obtains it.[4] If an attorney who holds a claim for

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Cal. 206; Baker v. Bibb, 17 B. Mon. 292; Purkitt v. Polack, 17 Cal. 327; Sheppard v. Iverson, 12 Ala. 97; Rollins v. Mooers, 25 Me. 192; Blodgett v. Chaplin, 48 Me. 322; Glenn v. Glenn, 17 Iowa, 498; Hartshorne v. Eames, 31 Me. 93; Clark v. Depew, 25 Penn. 509; Harrison v. Campbell, 6 Dana, 263; Tubb v. Williams, 7 Humph. 367; Bulkley v. Buffington, 5 McLean, 457; Dick v. Grissom, 1 Freem. Ch. (Miss.) 428; Beeler v. Bullitt, 3 A. K. Marsh, 280; Enders v. Swayne, 8 Dana, 103; McConnell v. Brown, Litt. Sel. Cas. 459; Pope v. Andrews, 1 S. & M. Ch. 135; Parrish v. Danford, 1 Bond. 345; Cox v. Fraley, 26 Ark. 20; Dunlap v. Haynes, 4 Heisk. 476.

[1] Glenn v. Glenn, 17 Iowa, 498; Crawford v. Kirksey, 50 Ala. 591; Wake v. Griffin; 9 Neb. 47; Pervel v. Merritt, 70 Mo. 275; Apperson v. Burgett, 33 Ark. 328.

[2] Copis v. Middleton, 2 Madd. 410; Scheitlin v. Stone, 3 Barb. 634; S. C. 29 How. Pr. 355; Fuller v. Brewster, 53 Md. 358.

[3] Glenn v. Glenn, 17 Iowa, 498.

[4] Twyne's Case, 3 Co. 80; Moore, 638; Merrill v. Locke, 41 N. H. 486; Satterwhite v. Hicks, Busbee, 105; Overton v. Morris, 3 Port, 249; Sheppard v. Iverson, 12 Ala. 97; Johnston v. Dick, 27 Miss. 277; Gibson v. Hill, 23 Tex. 77; Stewart v. Wilson, 42 Penn. 450; Hartshorne v. Eames, 31 Me. 93; Bean v. Smith, 2 Mason, 252; Venable v. Bank, 2 Pet. 107; Steele v. Parsons, 9 Mo. 823; Colquitt v. Thomas, 8 Geo. 258; Clark v. Depew, 25 Penn. 509; Lillard v. McGee, 4 Bibb, 165; Garland v. Rives, 4 Rand. 282; U. S. v. Lottridge, 1 McLean, 246; Thompson v. Drake, 3 B. Mon. 565; Beeler v. Bullitt, 3 A. K. Marsh, 280; Yoder v. Standiford, 7 Mon. 478; Adams v. Sater, 19 Ind. 418; Howard v. Craw-

collection is induced to delay the institution of a suit at the request of the debtor, who thereupon takes advantage of the delay to make a conveyance, this is a badge of fraud the same as if the suit were actually pending.[1] The pendency of a suit, however, is merely a badge of fraud. A transfer may be shown to be fraudulent, although it was made when no suit was pending.[2] And, on the other hand, a transfer may be shown to be valid although it was made while a suit was pending, for the mere pendency of an action does not of itself make a transfer fraudulent.[3] The pendency of a suit is not constructive notice of the indebtedness to those who are not parties to the action.[4]

SECRECY.—Secrecy is a badge of fraud, because it tends to deceive creditors, and is not in the course in which honest men commonly transact business. *Dona clandestina sunt suspiciosa.*[5] The secrecy which constitutes a badge of

ford, 21 Tex. 399; Redfield Manuf. Co. v. Dysart, 62 Penn. 62; Godfrey v. Germain, 24 Wis. 410; Babb v. Clemson, 10 S. & R. 419; Williams v. Lowndes, 1 Hall, 579; Thornton v. Davenport, 2 Ill. 296; Stoddard v. Butler, 20 Wend. 507; s. c. 7 Paige, 163; Jackson v. Mather, 7 Cow. 301; Schaferman v. O'Brien, 28 Md. 565; Streeper v. Eckart, 2 Whart. 302; Paulling v. Sturgus, 3 Stew. 95; Barr v. Hatch, 3 Ohio, 527; Callan v. Statham, 23 How. 477; Sayre v. Fredericks, 16 N. J. Eq. 205; Smith v. Henry, 2 Bailey, 118; s. c. 1 Hill, 16; Forsyth v. Matthews, 14 Penn. 100; Peck v. Land, 2 Geo. 1; Barr v. Hatch, 3 Ohio, 527; Lowry v. Howard, 35 Ind. 170; Shearon v. Henderson, 38 Tex. 245; Fishel v. Ireland, 52 Geo. 632; Hughes v. Roper, 42 Tex. 116; Ford v. Johnston, 14 N. Y. Supr. 563; Crawford v. Kirksey, 50 Ala. 591; Booker v. Worrill, 57 Geo. 235; Carter v. Baker, 10 Heisk, 640; Sherman v. Hogland, 73 Ind. 472; Soden v. Soden, 54 N. J. Eq. 115.

[1] Morris Canal Co. v. Stearns, 23 N. J. Eq. 414.

[2] Shean v. Shay, 42 Ind. 375.

[3] Ray v. Brown, 2 Blackf. 258; Lowry v. Howard, 35 Ind. 170; Smith v. Henry, 2 Bailey, 118; 1 Hill 16; Sipe v. Earman, 26 Gratt. 563.

[4] Shearon v. Henderson, 38 Tex. 245.

[5] Twyne's Case, 3 Co. 80; Moore, 638; Corlett v. Radcliffe, 14 Moore, P. C. 121; McLachlan v. Wright, 3 Wend. 348; Burtus v. Tisdall, 4

fraud is not, however, a mere want of notoriety, but a concealment or an attempted concealment.[1] It is not, moreover, conclusive proof, but merely a circumstance from which, in connection with other facts, fraud may be inferred.[2] Consequently an agreement by a vendee to conceal his purchase is merely evidence of fraud.[3] The declaration of an intention to make an assignment may produce the mischief which the assignment is intended to prevent, and secrecy may therefore be used.[4]

CONCEALMENT.—A deed not at first fraudulent may become so by being concealed, because by its concealment persons may be induced to give credit to the grantor.[5] In such a case the use that is made of it relates back, and shows the intent with which it was made.[6] The omission to place a deed on record,[7] or leaving it in the hands of the

Barb. 571; Darden v. Skinner, 2 N. C. L. R. 279; Shiveley v. Jones, 6 B. Mon. 274; Barrow v. Bailey, 5 Fla. 9; James v. Johnson, 22 La. An. 195; Stone v. Grubbam, 2 Bulst. 217; s. c. 1 Rol. Rep. 3; Woodham v. Baldock, Gow. 35 note; 3 Moore, 11; Vick v. Keys, 2 Hayw. 126; Warner v. Norton, 20 How. 448; Callan v. Statham, 23 How. 477; Ross v. Crutsinger, 7 Mo. 245; King v. Moon, 42 Mo. 551; Delaware v. Ensign, 21 Barb. 85.

[1] Vick v. Keys, 2 Hayw. 126.

[2] Stone v. Grubbam, 2 Bulst. 217; s. c. 1 Rol. Rep. 3; Warner v. Norton, 20 How. 448.

[3] Gould v. Ward, 21 Mass. 103; s. c. 22 Mass. 291.

[4] Haven v. Richardson, 5 N. H. 113.

[5] Hungerford v. Earle, 2 Vern. 261; Sands v. Hildreth, 2 Johns. Ch. 35; s. c. 14 Johns. 493; Lewkner v. Freeman, 2 Freem. 236; s. c. Prec. Ch. 105; s. c. Eq. Cas. Abr. 149; Hilderburn v. Brown, 17 B. Mon. 779; Tarback v. Marbury, 2 Vern. 510; Scrivenor v. Scrivenor, 7 B. Mon. 374.

[6] Worseley v. De Mattos, 1 Burr. 467; Constantine v. Twelves, 29 Ala. 607; McWilliams v. Rodgers, 56 Ala. 87.

[7] Coates v. Gerlach, 44 Penn. 43; Hood v. Brown, 2 Ohio, 267; Scrivenor v. Scrivenor, 7 B. Mon. 374; Law v. Smith, 4 Ind. 56; Hodges v. Blount, 1 Hayw. 414; Bank of U. S. v. Houseman, 6 Paige, 526; Bank v. Gourdin, Speers Ch. 439; Gaither v. Mumford, 1 N. C. T. R. 167; Beecher

grantor,[1] or placing it in the hands of a third person to be produced or suppressed accordingly as exigencies may demand,[2] are instances of secrecy that are within the rule. If secrecy is a part of the consideration for securities obtained from a debtor who is about to abscond, it contaminates them; but if there is no such agreement, those who receive them need not apprise other creditors of his intention.[3]

SECRET TRUST.—A secret trust between the parties is a badge of fraud, for fraud is always appareled and clad with a trust, and a trust is the cover of fraud. That which is called a trust *per nomen speciosum*, as between the grantor and the grantee, is in truth as to all the creditors a fraud, for they are thereby defeated and defrauded.[4]

FALSE RECITALS.—An instrument which misrepresents the transaction that it recites is evidence of a secret trust, and is calculated to mislead and deceive creditors.[5] A false recital is, therefore, a badge of fraud, and the instrument in which it occurs must sustain a rigorous examination. Erroneous recitals may, however, and often do happen through mistake, inadvertence, or carelessness, and for

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v. Clark, 10 N. B. R. 385; s. c. 12 Blatch. 256; Folsom v. Clemence, 111 Mass. 273; Hilliard v. Cagle, 46 Miss. 309; Thouron v. Pearson, 29 N. J. Eq. 487; Stewart v. Hopkins, 30 Ohio St. 502; Thompson v. Feagin, 60 Geo. 82; Van Kleeck v. Miller, 19 N. B. R. 484.

[1] Eveleigh v. Pursford, 2 Mood. & Rob. 539.

[2] Brown v. McDonald, 1 Hill Ch. 297; Lasher v. Stafford, 30 Mich. 369.

[3] Hafner v. Irwin, 1 Ired. 490.

[4] Twyne's Case, 3 Co. 80; Moore, 638; Shaffer v. Watkins, 7 W. & S. 219; McCulloch v. Hutchinson, 7 Watts, 434; Robert v. Hodges, 16 N. J. Eq. 299.

[5] Kempner v. Churchill, 8 Wall. 362; Divver v. McLaughlin, 2 Wend. 596; Rickett v. Pipkin, 64 Ala. 920; Summers v. Howland, 2 Baxter, 407.

this reason are not conclusive evidence of fraud.[1] In order to be conclusive, there must be intentional disguise, dissembling, or falsehood.[2] When, however, the true character and consideration of a transaction are not fairly and plainly stated, the instrument is open to suspicion, and the question arises whether, in misrepresenting the transaction, instead of stating the truth, there was not a design to mislead and deceive creditors;[3] but if, upon investigation, the real transaction appears to be fair, though somewhat different from that which is described, it will be valid.[4]

Absolute Deeds as Security.—Taking an absolute deed as a security for money is a mark of fraud, for it is calculated to deceive creditors and to make them believe that no part of the property is subject to their demands, when in fact it is otherwise.[5] The right to redeem is an interest of value to him who has it, and to reserve it in such a way as leaves it altogether in confidence between the parties, and enables them to perform the trust as between themselves, and at their pleasure to deny its existence, and refuse its execution for the benefit of creditors, is plainly deceptive, and tends to delay, hinder and defraud creditors. It is, however, merely a badge, and not conclusive evidence of fraud.[6] In this respect there is no

[1] Fetter v. Cirode, 4 B. Mon. 482.

[2] Barker v. French, 18 Vt. 460.

[3] McKinster v. Babcock, 26 N. Y. 378; Ingles v. Donaldson, 2 Hayw. 57.

[4] Shirras v. Craig, 7 Cranch, 34; Goodheart v. Johnson, 88 Ill. 58.

[5] Ingles v. Donaldson, 2 Hayw. 57; Gaither v. Mumford, 1 N. C. T. R. 167.

[6] Harrison v. Phillips' Academy, 12 Mass. 456; Richards v. Allen, 25 Mass. 405; New England Marine Ins. Co. v. Chandler, 16 Mass. 275; Reed v. Woodman, 4 Me. 400; Stevens v. Hinckley, 43 Me. 440; Gibson v. Seymour, 4 Vt. 518; Smith v. Onion, 19 Vt. 427; Rucker v. Abell, 8 B. Mon. 566; Gaffney v. Signaigo, 1 Dillon, 158; Gibbs v. Thompson, 7

distinction between the conveyance of real and personal estate.[1] If, however, it appears that the grantee took an absolute conveyance, with a secret trust to hold the surplus for the use of the grantor, with the intention to prevent his creditors from resorting to it, the transfer will be void.[2] A mere understanding that the grantor may repurchase the property at some future time, by paying a sum equal to the original price, if made *bona fide*, is not fraudulent, whether it be by parol or in writing.[3] A note for an absolute sum may be taken to cover a liability as a surety.[4]

False Statement of Consideration.—A false statement of the consideration for a transfer tends to deceive

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Humph. 179; Bank v. Jacobs, 10 Mich. 349; Chickering v. Hatch, 3 Sumner, 474; Blair v. Bass, 4 Blackf. 539; Ingles v. Donaldson, 2 Hayw. 57; Reed v. Jewett, 5 Me. 96; Emmons v. Bradley, 56 Me. 333; Spaulding v. Austin, 2 Vt. 555; Oriental Bank v. Haskins, 44 Mass. 332; Cutler v. Dickinson, 25 Mass. 386; Yoder v. Standiford, 7 Mon. 478; Wiley v. Lashlee, 8 Humph. 717; Fletcher v. Willard, 31 Mass. 464; Waters v. Riggin, 19 Md. 536; Doswell v. Adler, 28 Ark. 82; Thompson v. Pennell, 67 Me. 159; Gibson v. Hough, 60 Geo. 588; Phinizy v. Clark, 62 Geo. 623; *contra*, Winkley v. Hill, 9 N. H. 31; Towle v. Hoitt, 14 N. H. 61; Ladd v. Wiggins, 35 N. H. 421; Smith v. Lowell, 6 N. H. 67; Parker v. Pattee, 4 N. H. 176; Tift v. Walker, 10 N. H. 150; Boardman v. Cushing, 12 N. H. 105; McCulloch v. Hutchinson, 7 Watts, 434; Chenery v. Palmer, 6 Cal. 119; King v. Cantrel, 4 Ired. 251; Halcomb v. Ray, 1 Ired. 340; Gregory v. Perkins, 4 Dev. 50; Bryant v. Young, 21 Ala. 264; Hartshorn v. Williams, 31 Ala. 149; Hough v. Ives, 1 Root, 492; Benton v. Jones, 8 Conn. 186; North v. Belden, 13 Conn. 376; McNeal v. Glenn, 4 Md. 87; s. c. 3 Md. Ch. 349; Sims v. Gaines, 64 Ala. 392; *vide* St. John v. Camp, 17 Conn. 222; Whitaker v. Sumner, 37 Mass. 399. Where it is held to be conclusive it does not make the deed void as against subsequent creditors. Smyth v. Carlisle, 16 N. H. 464; s. c. 17 N. H. 417.

[1] Oriental Bank v. Haskins, 44 Mass. 332.

[2] Barker v. French, 18 Vt. 460; Harrison v. Phillips' Academy, 12 Mass. 456.

[3] Phettiplace v. Sayles, 4 Mason, 312; Barr v. Hatch, 3 Ohio, 527; Glenn v. Randall, 2 Md. Ch. 220; Anderson v. Fuller, 1 McMullan Ch. 27.

[4] Prescott v. Hayes, 43 N. H. 593.

creditors, and is a badge of fraud.[1] This is especially true in regard to a mortgage. Any discrepancy between the amount to be secured and that which is in form set forth as the debt of the mortgagor, is a badge of fraud.[2] If the statement is intentionally false, it is an act of direct fraud, for no device is more deceptive, and more calculated to baffle, delay, or defeat creditors, than the creation of incumbrances for debts that are fictitious, or mainly so.[3] A mortgage may, however, include debts due to others, which the mortgagee at the time gives his promise, whether by parol or in writing, to pay.[4] The taking of a judgment,[5] or the issuing of an execution,[6] for more than is

[1] Shirras v. Craig, 7 Cranch, 34; McKinster v. Babcock, 26 N. Y. 378; Gibbs v. Thompson, 7 Humph. 179; Bumpas v. Dotson, 7 Humph. 310; Miller v. Lockwood, 32 N. Y. 293; Peebles v. Horton, 64 N. C. 374; Foster v. Woodfin, 11 Ired. 339; McCaskle v. Amarine, 12 Ala. 17; Thompson v. Drake, 3 B. Mon. 565; Venable v. Bank, 2 Pet. 107; McElfatrick v. Hicks, 21 Penn. 402; Turbeville v. Gibson, 5 Tenn. 565; Enders v. Swayne, 8 Dana, 103; Keith v. Proctor, 8 Baxter, 189; Kevan v. Crawford, L. R. 6 Ch. Div. 29.

[2] Parker v. Barker, 43 Mass. 423; Prince v. Sheppard, 26 Mass. 176; Bailey v. Burton, 8 Wend. 339; Miller v. Lockwood, 32 N. Y. 293; Stover v. Harrington, 7 Ala. 142; Lynde v. McGregor, 95 Mass. 172; Frost v. Warren, 42 N. Y. 204; Beeler v. Bullitt, 3 A. K. Marsh, 280; Tripp v. Vincent, 8 Paige, 176; Wilson v. Horr, 15 Iowa, 489; Wooley v. Frey, 30 Ill. 158; Foley v. Foley, 14 N. J. Eq. 350; Davenport v. Cummings, 15 Iowa, 219; Alabama Ins. Co. v. Pattway, 24 Ala. 544; Weeden v. Hawes, 13 Conn. 50; Thompson v. Drake, 3 B. Mon. 565; Bumpas v. Dotson, 7 Humph. 310; McCrassly v. Haslock, 4 Baxter, 1; Barkow v. Sanger, 47 Wis. 500; Willison v. Desinberg, 41 Mich. 156; King v. Hubbell, 42 Mich. 597; Schmidt v. Opie, 33 N. J. Eq. 138; Goff v. Rogers, 71 Ind. 459; Tognini v. Kyle, 15 Nev. 464; Holt v. Creamer, 34 N. J. Eq. 181; Heintze v. Bentley, 34 N. J. Eq. 562; Wood v. Scott, 58 Iowa, 114; Cordes v. Straszer, 8 Mo. Ap. 61; Kalk v. Fielding, 50 Wis. 339; vide Butts v. Peacock, 23 Wis. 359.

[3] Hawkins v. Alston, 4 Ired. Eq. 137; Marriott v. Givens, 8 Ala. 694.

[4] Carpenter v. Muren, 42 Barb. 300.

[5] Clark v. Douglass, 62 Penn. 408; Felton v. Wadsworth, 61 Mass. 587; Ayres v. Husted, 15 Conn. 504; Shedd v. Bank, 32 Vt. 709; Davenport v. Wright, 51 Penn. 292.

[6] Wilder v. Fondey, 4 Wend. 100; Harris v. Alcock, 10 G. & J. 226.

due, is not *per se* fraudulent, but the validity of the judgment or execution depends on the intent of the parties. A false recital of the payment of the consideration is a badge of fraud, but the inference may be rebutted by proof that the consideration was subsequently paid in good faith, in pursuance of the understanding of the parties at the time.[1] The antedating of an instrument is also a mark of fraud.[2]

INADEQUACY.—A vendee who purchases the property of an insolvent debtor for less than its value thereby deprives the creditors of the difference, and defeats their just expectations. There is also in such a case a violent presumption of a secret trust.[3] Inadequacy of price thus tends to defraud them, and is a badge of fraud.[4] There is no rule of law as to what disparity between the real value

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[1] Alexander v. Todd, 1 Bond, 175.

[2] Wright v. Hancock, 3 Munf. 521; Jones v. Henry, 3 Litt. 427; Lindle v. Neville, 13 S. & R. 227; Patterson v. Bodenhamer, 9 Ired. 96; Moog v. Benedicks, 49 Ala. 512.

[3] Shelton v. Church, 38 Conn. 416; Rhoads v. Blatt, 84 Penn. 31.

[4] Steere v. Hoagland, 39 Ill. 264; Sands v. Hildreth, 14 Johns. 493; S. C. 2 Johns. Ch. 35; Darden v. Skinner, 2 N. C. L. R. 279; Jessup v. Johnston, 3 Jones (N. C.), 335; Gardiner Bank v. Wheaton, 8 Me. 373; Hamet v. Dundass, 4 Penn. 178; Crary v. Sprague, 12 Wend. 41; Yoder v. Standiford, 7 Mon. 478; Bowles v. Shoenberger, 2 B. Mon. 372; Hubbs v. Bancroft, 4 Ind. 388; Wright v. Stannard, 2 Brock. 311; Williams v. Cheeseborough, 4 Conn. 356; St. John v. Camp, 17 Conn. 222; Wells v. Thomas, 10 Mo. 237; Monell v. Sherrick, 54 Ill. 269; Williamson v. Goodwyn, 9 Gratt. 503; Tubb v. Williams, 7 Humph. 367; Sheppard v. Iverson, 12 Ala. 97; Trimble v. Ratcliffe, 9 B. Mon. 511; S.C. 12 B. Mon. 32; Merry v. Bostwick, 13 Ill. 398; Burke v. Murphy, 27 Miss. 167; Motley v. Sawyer, 38 Me. 68; Doughton v. Gray, 10 N. J. Eq. 323; Taylor v. Moore, 2 Rand. 563; Bray v. Hussey, 24 Ind. 228; Blow v. Maynard, 2 Leigh, 29; Bay v. Cook, 31 Ill. 336; Smead v. Williamson, 16 B. Mon. 492; Kinder v. Macy, 7 Cal. 206; Stanton v. Green, 34 Miss. 576; Gibson v. Hill, 23 Tex. 77; Haney v. Nugent, 13 Wis. 283; Waterman v. Donalson, 43 Ill. 29; Craver v. Miller, 65 Penn. 456; Tavener v. Robinson, 2 Rob. 280; Hudgins v. Kemp, 20 How. 45; Callan v. Statham,

of property and the consideration paid will, in any case, constitute inadequacy of price, but this must be ascertained from the facts and circumstances of each particular case.[1] The value of a thing is what it will produce, and admits of no precise standard. It must be in its nature fluctuating and dependent on various circumstances. To justify an inference of fraud from the inadequacy of the price alone, the consideration must be so clearly below the market value as to strike the understanding at once with the conviction that such a sale never could have been made in good faith.[2] But when circumstances exist raising a doubt of the fairness of the transaction, the vendee must prove the payment of an adequate consideration. The transaction is scrutinized more closely, and the same disparity is not required as in controversies between vendor and vendee.[3]

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23 How. 477; Kempner v. Churchhill, 8 Wall. 362; Borland v. Mayo, 8 Ala. 104; Roach v. Deering, 17 Miss. 316; Foster v. Pugh, 20 Miss. 416; Williams v. Kelsey, 6 Geo. 365; Delaware v. Ensign, 21 Barb. 85; Metropolitan Bank v. Durant, 22 N. J. Eq. 35; Shelton v. Church, 38 Conn. 416; Scott v. Winship, 20 Geo. 429; Hyde v. Sontag, 1 Saw, 249; Jaeger v. Kelly, 44 How. Pr. 122; 52 N. Y. 274; Peigne v. Snowden, 1 Dessau, 591; Morris Canal Co. v. Sterns, 23 N. J. Eq. 414; Dunlap v. Haynes, 4 Heisk. 476; Laidlaw v. Gilmore, 47 How. Pr. 67; Ames v. Gilmore, 59 Mo. 537; Jewett v. Cook, 81 Ill. 260; Hartfield v. Simmons, 12 Heisk. 253; Loring v. Dunning, 16 Fla. 119; Stevens v. Dillman, 86 Ill. 233; Apperson v. Burgett, 33 Ark. 328; McFadden v. Mitchell, 54 Cal. 628; Hoboken Bank v. Beekman, 33 N. J. Eq. 53; Roche v. Hassard, 5 Ir. Ch. 14; Fisher v. Shelver, 53 Wis. 498.

[1] Barrow v. Bailey, 5 Fla. 9; Jaeger v. Kelley, 52 N. Y. 274; 44 How. Pr. 122; Day v. Cole, 44 Iowa, 452; Van Wyck v. Baker, 23 N. Y. Supr. 68.

[2] Feigley v. Feigley, 7 Md. 537; Kempner v. Churchill, 8 Wall. 362; Copis v. Middleton, 2 Madd. 410; Ratcliffe v. Trimble, 12 B. Mon. 32; Borland v. Mayo, 8 Ala. 104; Prosser v. Henderson, 11 Ala. 484; Hoot v. Sorrell, 11 Ala. 386; Jamison v. King, 50 Cal. 132; Hunt v. Hoover, 34 Iowa, 77; Wilson v. Jordan, 3 Woods, 642; Fuller v. Brewster, 53 Md. 358; Kaufman v. Whitney, 50 Miss. 103.

[3] Barrow v. Bailey, 5 Fla. 9; Seaman v. White, 8 Ala. 656; Bozman v. Draughan, 3 Stew. 243; Bryant v. Kelton, 1 Tex. 415; Kuykendall v. McDonald, 15 Mo. 416; State v. Evans, 38 Mo. 150.

A fictitious consideration created by a purchase of articles at high prices from the vendee is not sufficient.[1] The pressure of circumstances may, however, compel a debtor to sell his property at a sacrifice, for the purpose of meeting his liabilities, and in such instances a sale for less than the real value is not unusual, and does not indicate an impure intention.[2]

Excess in Mortgage.—A mortgage interposes an obstacle between creditors and the property of the debtor, and tends to embarrass them in their attempts to realize their claims, and thus hinder and delay them in their efforts to obtain satisfaction. If it includes an excess above what is fairly necessary to secure the mortgage debt, it is therefore a circumstance of fraud.[3] A mortgagee is entitled to property of value fully sufficient to cover his demand under any and all contingencies that may be expected, or reasonably apprehended, but the debtor can not, under the pretense of securing a debt, convey much more than is necessary for that purpose, and really with the intent to secure the use to himself and baffle his creditors. Hence the question is always one of intention.[4]

Duration of Mortgage.—The time which a mortgage has to run is a circumstance to be taken into consideration

[1] Reed v. Carl, 11 Miss. 74.

[2] Hubbs v. Bancroft, 4 Ind. 388; Hale v. Saloon Omnibus Co., 4 Drew, 492; s. c. 28 L. J. Ch. 777.

[3] Bailey v. Burton, 8 Wend. 339; Hawkins v. Allston, 4 Ired. Eq. 137; Adams v. Wheeler, 27 Mass. 199; Bennett v. Union Bank, 5 Humph. 612; Mitchell v. Beal, 8 Yerg. 134; Wright v. Hancock, 3 Munf. 521; Ford v. Williams, 13 N. Y. 577; 24 N. Y. 359; Davis v. Ransom, 18 Ill. 396; Jewett v. Warren, 12 Mass. 300; Hickman v. Perrin, 6 Cold. 135; Strohm v. Hayes, 70 Ill. 41; Crapeter v. Williams, 21 Kans. 109; vide Downs v. Kissam, 10 How. 102.

[4] Burgin v. Burgin, 1 Ired. 453.

in determining the fairness of the transaction. If all or a greater portion of the debtor's property is included in the assurance, and if the value is greatly or considerably beyond the amount of the debt secured, the period of indulgence to the debtor is important to the creditors, because to the surplus beyond the mortgagee's claims they must look for the satisfaction of their demands. The evidence of a fraudulent purpose is greater in proportion as the excess in value is increased, and the time of indulgence prolonged.[1]

Unusual Credit.—Creditors are entitled to sell the property of the debtor for the satisfaction of their demands, according to the mode and terms prescribed by the law, and any expedient adopted by the debtor with the clear intent to prevent that, is fraudulent. It is a hinderance and delay within the meaning of the statute. A sale of his property upon a long and unusual credit has a tendency to delay and hinder creditors, by interposing a legal title between them and the debtor's estate, and compelling them to wait for the expiration of the credit, and consequently is a badge of fraud.[2] A sale upon credit may be good, for there is no principle of the law that prevents a debtor from

[1] Bennett v. Union Bank, 5 Humph. 612; Bigelow v. Stringer, 40 Mo. 195; Reynolds v. Crook, 31 Ala. 634; Mitchell v. Beal, 8 Yerg. 134; Farmers' Bank v. Douglass, 19 Miss. 469; Lewis v. Caperton, 8 Gratt. 148; Montgomery v. Kirksey, 26 Ala. 172; Wiley v. Knight, 27 Ala. 336; Potter v. McDowell, 31 Mo. 62; Henderson v. Downing, 24 Miss. 106; Davis v. Ransom, 18 Ill. 396; Roane v. Bank, 1 Head, 526; Brinley v. Spring, 7 Me. 241.

[2] Tubb v. Williams, 7 Humph. 367; Mills v. Carnley, 1 Bosw. 159; Stanton v. Green, 34 Miss. 576; Baker v. Bibb, 17 B. Mon. 292; Potter v. McDowell, 31 Mo. 62; Gillett v. Phelps, 12 Wis. 392; Pilling v. Otis, 13 Wis. 495; Clark v. Wise, 39 How. Pr. 97; Blodgett v. Chaplin, 48 Me. 322; Ruhl v. Phillips, 2 Daly, 45; Dewey v. Littlejohn, 2 Ired. Eq. 495; Borland v. Mayo, 8 Ala. 104; Roberts v. Shepard, 2 Daly, 110; Swift v. Lee, 65 Ill. 336; Burt v. Keys, 1 Flippin, 61.

selling on credit, if thereby he is able to obtain a better price,[1] but if the debtor is insolvent, and his intent is to coerce his creditors to accept notes drawn for a long time, or keep them at bay until the time of credit expires, the purpose is fraudulent.[2] This is especially true when the sale is not in the continuation of the debtor's business, with an honest effort to retrieve his fortunes, but is made as an abandonment of his business, and a relinquishment of all hope of future success.[3]

PERISHABLE ARTICLES.—If a mortgage or deed of trust includes perishable articles, or articles consumable in their use, this is a badge of fraud, for it raises a presumption of a secret trust for the ease and favor of the debtor.[4] It is for the same reason a mark of fraud if the debtor sells chattels which are subject to a mortgage and converts the avails to his own use.[5]

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[1] Starr v. Strong, 2 Sandf. Ch. 139; Scheitlin v. Stone, 43 Barb. 634; s. c. 29 How. Pr. 355; Pattison v. Stewart, 6 W. & S. 72; McCasland v. Carson, 1 Head, 117; Bridge v. Loeschigk, 42 Barb. 171; s. c. 42 N. Y. 421; Ocoee Bank v. Nelson, 1 Cold. 186; Ruhl v. Phillips, 48 N. Y. 125; Starin v. Kelly, 36 N. Y. Sup. 366; Harris v. Burns, 50 Cal. 140.

[2] Kepner v. Burkhart, 5 Penn. 478; Pope v. Andrews, 1 S. & M. Ch. 135; How v. Camp, Walker Ch. 427; Owen v. Arvis, 26 N. J. 22; Browning v. Hart, 6 Barb. 91; Wash v. Medley, 1 Daua, 269; Borland v. Walker, 7 Ala. 269; Cooke v. Smith, 3 Sandf. Ch. 333; Downing v. Kelly, 49 Barb. 547.

[3] Nesbit v. Digby, 13 Ill. 387.

[4] Elmes v. Sutherland, 7 Ala. 262; Hunter v. Foster, 4 Humph. 211; Harney v. Pack, 12 Miss. 229; Farmers' Bank v. Douglass, 19 Miss. 469; Potter v. McDowell, 31 Mo. 62; Darwin v. Handley, 3 Yerg. 502; Simpson v. Mitchell, 8 Yerg. 417; Richmond v. Curdup, Meigs, 581; Planters' & Merchants' Bank v. Clarke, 7 Ala. 765; Ewing v. Cargill, 21 Miss. 79; Shurtleff v. Willard, 36 Mass. 202; Ravisies v. Alston, 5 Ala. 297; Googins v. Gilmore, 47 Me. 9; Sipe v. Earman, 26 Gratt. 563.

[5] Dickenson v. Cook, 17 Johns. 332; McNeal v. Glenn, 4 Md. 87; s. c. 3 Md. Ch. 349; Park v. Harrison, 8 Humph. 412.

POSSESSION OF LAND.—The retention of the possession of land, with the exercise of unequivocal acts of ownership over it, is a badge of fraud, for it is not in the usual course of business, and indicates a secret trust for the benefit of the debtor.[1] The acts of ownership by the debtor may consist either in renting,[2] or collecting rents,[3] or giving receipts for rent in his own name,[4] or directing the making of leases,[5] or making sales of the land,[6] even though he acts

[1] Duvall v. Waters, 1 Bland, 569; s. c. 11 G. & J. 37; McNeal v. Glenn, 4 Md. 87; s. c. 3 Md. Ch. 349; Jackson v. Mather, 7 Cow. 301; Avery v. Street, 6 Watts, 247; Borland v. Walker, 7 Ala. 269; Starr v. Starr, 1 Ohio, 321; Callan v. Statham, 23 How. 477; Gibbs v. Thompson, 7 Humph. 179; Roach v. Deering, 17 Miss. 316; King v. Moon, 42 Mo. 551; Halbert v. Grant, 4 Mon. 580; Yoder v. Standiford, 7 Mon. 478; How v. Camp, Walker Ch. 427; Brown v. McDonald, 1 Hill Ch. 297; Dick v. Grissom, Freem. Ch. (Miss.) 428; Williamson v. Goodwyn, 9 Grat. 503; Darden v. Skinner, 2 N. C. L. R. 279; Dewey v. Littlejohn, 2 Ired. Eq. 495; Trimble v. Ratcliffe, 9 B. Mon. 511; 13 B. Mon. 32; Johnston v. Dick, 27 Miss. 277; Steele v. Ward, 25 Iowa, 535; Planters' Bank v. Walker, 7 Ala. 926; Rollins v. Mooers, 25 Me. 192; Ringgold v. Waggoner, 14 Ark. 69; Stanton v. Green, 34 Miss. 576; Knox v. Hunt, 34 Miss. 655; Hartshorne v. Eames, 31 Me. 93; Middleton v. Sinclair, 5 Cranch, C. C. 409; Farnsworth v. Bell, 5 Sneed, 531; Purkitt v. Polack, 17 Cal. 327; Sarle v. Arnold, 7 R. I. 582; Clark v. Johnston, 5 Day, 373; Lillard v. McGee, 4 Bibb, 165; U. S. v. Lottridge, 1 McLean, 246; Lewis v. Love, 2 B. Mon. 345; Venable v. Bank, 2 Pet. 107; Alexander v. Todd, 1 Bond, 175; Smith v. Hinson, 4 Heisk. 250; Willingham v. Smith, 48 Geo. 580; Hart v. Flinn, 36 Iowa, 366; Johnson v. Lovelace, 51 Geo. 18; Hamilton v. Blackwell, 60 Ala. 545.

[2] Duvall v. Waters, 1 Bland, 569; s. c. 11 G. & J. 37; Callan v. Statham, 23 How. 477; Bobb v. Woodward, 50 Mo. 95; Smith v. Hinson, 4 Heisk. 250; Jones v. King, 86 Ill. 225.

[3] Sands v. Hildreth, 14 Johns, 493; s. c. 2 Johns. Ch. 35; Lee v. Hunter, 1 Paige, 519; Lewis v. Love, 2 B. Mon. 345; Wisner v. Farnham, 2 Mich. 472; Walcott v. Almy, 6 McLean, 23; How v. Camp, Walker Ch. 427; Schaferman v. O'Brien, 28 Md. 565; Bobb v. Woodward, 50 Mo. 95; Swift v. Lee, 65 Ill. 336; Ames v. Gilmore, 59 Mo. 537; Power v. Alston, 93 Ill. 587.

[4] Duvall v. Waters, 1 Bland, 569; s. c. 11 G. & J. 37; Callan v. Statham, 23 How. 477.

[5] Schaferman v. O'Brien, 28 Md. 565.

[6] Alexander v. Todd, 1 Bond, 175; Smith v. Hinson, 4 Heisk. 250; Second Natl. Bank v. Gratman, 53 Md. 443.

under a power of attorney from the grantee,[1] or selling timber,[2] or digging coal,[3] or paying ground rent,[4] or paying taxes,[5] or making improvements,[6] or driving the grantee off the land.[7] The grantee may make a *bona fide* lease to the debtor,[8] but any act which is out of the usual course in the transaction, such as a nominal rent,[9] or the non-enforcement of payment of the rent,[10] or an excessive rent,[11] or any indefiniteness in the character, terms or length of the tenancy,[12] is a mark of fraud. Executing a mortgage to secure the grantor's debts,[13] or selling a part of the property to pay them,[14] or making a reconveyance of part for a nominal consideration,[15] or taking no steps for a long time to foreclose a pretended mortgage,[16] or selling to the deb-

[1] Starr v. Starr, 1 Ohio, 321; Gibbs v. Thompson, 7 Humph. 179; Stanton v. Green, 34 Miss. 576; Glenn v. Glenn, 17 Iowa, 498.

[2] Duvall v. Waters, 1 Bland, 569; s. c. 11 G. & J. 37.

[3] Alexander v. Todd, 1 Bond, 175.

[4] Schaferman v. O'Brien, 28 Md. 565.

[5] Stanton v. Green, 34 Miss. 576; Knox v. Hunt, 34 Miss. 655; Jacks v. Tunno, 3 Dessau. 1; Sands v. Codwise, 4 Johns. 536; Haskell v. Bakewell, 10 B. Mon. 106; Hutchinson v. Kelly, 1 Rob. 123; Bobb. v. Woodward, 50 Mo. 95; Jones v. King, 86 Ill. 225.

[6] Sands v. Hildreth, 14 Johns. 493; s. c. 2 Johns. Ch. 35; Merry v. Bostwick, 13 Ill. 398; Marshall v. Green, 24 Ark. 410; Gibbs v. Thompson, 7 Humph. 179; Tappan v. Butler, 7 Bosw. 480; Jones v. King, 86 Ill. 225.

[7] Duvall v. Waters, 1 Bland, 569; s. c. 11 G. & J. 37.

[8] Glenn v. Grover, 3 Md. 212; s. c. 3 Md. Ch. 29; Gardiner Bank v. Hogdon, 14 Me. 453; Barr v. Hatch, 3 Ohio, 527; Wood v. Shaw, 29 Ill. 444.

[9] Yoder v. Standiford, 7 Mon. 478; Durkee v. Mahoney, 1 Aik. 116; Bank v. Fink, 7 Paige, 87; Gibbs v. Thompson, 7 Humph. 179.

[10] Bank v. Fink, 7 Paige, 87; Reed v. Blades, 5 Taunt. 212.

[11] Hitchcock v. St. John, Hoff. Ch. 511.

[12] Dick v. Grissom, 1 Freem. Ch. (Miss.) 428.

[13] Schaferman v. O'Brien, 28 Md. 565; Bank of U. S. v. Housman, 6 Paige, 526; Jacks v. Tuno, 3 Dessau. 1; Hudgins v. Kemp, 20 How. 45.

[14] Alexander v. Todd, 1 Bond, 175.

[15] Gibbs v. Thompson, 7 Humph. 179.

[16] Gibbs v. Thompson, 7 Humph. 179.

tor's son,[1] or permitting the grantor to retain possession for a long time,[2] is a badge of fraud.

OUT OF THE USUAL COURSE.—Anything out of the usual course of business is a sign of fraud.[3] Unusual clauses in an instrument excite suspicion. *Clausulæ inconsuetæ semper inducunt suspicionem.*[4] The same principle applies to a sale out of the usual course of business,[5] to the absence of accounts between the parties, when the transfer purports to be in consideration of a debt due to the grantee,[6] or when the debtor professes to act as agent for the grantee,[7] to the absence of receipts upon the payment of money,[8] to the execution of a deed in the absence of the grantee,[9] to the retention of the deed[10] or the mortgage note[11] by the debtor, to the retention of the evidence of the debt by the creditor, when the transfer purports to

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[1] Phettiplace v. Sayles, 4 Mason, 312.

[2] McIntosh v. Bethune, 8 Ired. 139; Bank v. Fink, 7 Paige, 87; Swift v. Lee, 65 Ill. 336.

[3] Danjean v. Blacketer, 13 La. An. 595.

[4] Twyne's Case, 3 Co. 80; Moore 638; Harrison v. Campbell, 6 Dana, 263; Langford v. Fly, 7 Humph. 585.

[5] Peirce v. Merritt, 70 Mo. 275.

[6] McDowell v. Goldsmith, 6 Md. 319; s. c. 2 Md. Ch. 370; 24 Md. 214; Williams v. Cheeseborough, 4 Conn. 356; Enders v. Swayne, 8 Dana, 103; Basey v. Daniel, 1 Smith, 252; Wheelden v. Wilson, 44 Me. 1; Haney v. Nugent, 13 Wis. 283; Dick v. Grissom, 1 Freem. Ch. (Miss.) 428; Hyde v. Sontag, 1 Saw. 249; Shepherd v. Hill, 6 Lans. 387; Partridge v. Stokes, 44 How. Pr. 381; 66 Barb. 586; Hubbard v. Allen, 59 Ala. 283.

[7] Alexander v. Todd, 1 Bond, 175.

[8] Alexander v. Todd, 1 Bond, 175; Brinks v. Heise, 84 Penn. 246; Campbell v. Bowles, 30 Gratt. 652; Hamilton v. Blackwell, 60 Ala. 545.

[9] Enders v. Swayne, 8 Dana, 103; Swift v. Lee, 65 Ill. 336; McLean v. Lafayette Bank, 3 McLean, 587; Leadman v. Harris, 3 Dev. 144.

[10] Hungerford v. Earle, 2 Vern. 261; Tarback v. Marbury, 2 Vern. 510; Starr v. Starr, 1 Ohio, 321.

[11] Bullock v. Narrott, 49 Ill. 62.

be in consideration of the debt,[1] to the omission to execute the mortgage note at the same time with the mortgage,[2] to any alteration of a mortgage[3] note, to the alienation of valuable property without payment or security,[4] to a transfer in consideration of a worthless note,[5] to the purchase of property for which the grantee has no use,[6] to the grantee's entrance into a business foreign to his own,[7] to the grantee's pecuniary inability to make the purchase,[8] to the grantee's failure to pay taxes,[9] to the execution of a power of attorney by grantee to grantor,[10] to an immediate transfer to the debtor's wife,[11] to an immediate transfer to another, in consideration of property conveyed to the

[1] Gardner v. Broussard, 39 Tex. 372.

[2] Prior v. White, 12 Ill. 261. [3] Merrill v. Williamson, 35 Ill. 529.

[4] Duvall v. Waters, 1 Bland, 569; s. c. 11 G. & J. 37; Hendricks v. Robinson, 2 Johns. Ch. 283; s. c. 17 Johns. 438; Pope v. Andrews, 1 S. & M. Ch. 135; Smead v. Williamson, 16 B. Mon. 492; Owen v. Arvis, 26 N. J. 22; Seymour v. Lewis, 13 N. J. Eq. 439; Glenn v. Glenn, 17 Iowa, 498; Hinton v. Curtis, 1 Pitts. L. J. 198; Alexander v. Todd, 1 Bond, 175; Campbell v. Landberg, 27 Minn. 454.

[5] Buswell v. Lincke, 8 Daly, 518.

[6] Grubbs v. Greer, 5 Cold, 160.

[7] Boies v. Henney, 32 Ill. 130; Buswell v. Lincke, 8 Daly, 518

[8] Sands v. Codwise, 4 Johns. 536; Railroad Co. v. Kyle, 5 Bosw. 587; Jessup v. Johnston, 3 Jones (N.C.) 335; Overton v. Morris, 3 Port. 249; Bredin v. Bredin, 3 Penn. 81; Pope v. Andrews, 1 S. & M. Ch. 135; Enders v. Swayne, 8 Dana, 103; Venable v. Bank, 2 Pet. 107; McIlvoy v. Kennedy, 2 Bibb, 380; McLean v. Morgan, 5 B. Mon. 282; Gordon v. Lowell, 21 Me. 251; Van Winkle v. Smith, 26 Miss. 491; Johnston v. Dick, 27 Miss. 277; Ringgold v. Waggoner, 14 Ark. 69; Smead v. Williamson, 16 B. Mon. 492; Owen v. Arvis, 26 N. J. 22; Farnsworth v. Bell, 5 Sneed, 531; Seymour v. Lewis, 13 N. J. Eq. 439; Glenn v. Glenn, 17 Iowa, 498; James v. Johnston, 22 La. An. 195; Graham v. Smith, 25 Penn. 323; Andrews v. Jones, 10 Ala. 400; Parrish v. Danford, 1 Bond, 345; McCutchen v. Peigne, 4 Heisk. 565; Dunlap v. Haynes, 4 Heisk. 476; Swift v. Lee, 65 Ill. 336.

[9] Bulkley v. Buffington, 5 McLean, 457; Judge v. Vogle, 38 Mich. 569.

[10] English v. King, 10 Heisk. 666.

[11] McCullock v. Doak, 68 N. C. 267.

debtor's wife,[1] to the absence of pressure by a preferred creditor,[2] to the absence of competition at a public sale,[3] to the vendee's declaration that he is purchasing for the debtor,[4] to the confession of a judgment and the issuing of an execution on the same day,[5] to the grantor's concealment of property,[6] or flight,[7] to an indemnity for sureties whose liabilities are remote and depend upon a contingency,[8] to inconsistent statements,[9] and to other fraudulent transactions between the same parties.[10] The delivery of the deed by the debtor to the recorder is not a mark of fraud.[11] A written transfer of personal property is merely a suspicious circumstance.[12] If the grantee has been the attorney of the grantor, and substantially knows the condition of the title, it is no badge of fraud to omit to make an examination.[13]

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[1] Newman v. Cordell, 43 Barb. 448.

[2] Eveleigh v. Purrsford, 2 Mood. & Rob. 539; Leadman v. Harris, 3 Dev. 144; Kennedy v. Ross, 2 Mills Const. (S. C.) 125.

[3] Tavenner v. Robinson, 2 Rob. 280.

[4] Tavenner v. Robinson, 2 Rob. 280.

[5] Floyd v. Goodwin, 8 Yerg. 484.

[6] Avery v. Street, 6 Watts, 247; Comstock v. Rayford, 20 Miss. 369; s. c. 9 Miss. 423; Danby v. Sharp, 2 McArthur, 435; Summers v. Howland, 2 Baxter, 407; Hillsman v. Blackwell, 10 Heisk. 480; English v. King, 10 Heisk. 666; Stevens v. Dillman, 86 Ill. 233; Embry v. Klemm, 30 N. J. Eq. 517.

[7] Rogers v. Hall, 4 Watts, 359; Wright v. Hancock, 3 Munf. 521; Fougeres v. Zacharie, 5 J. J. Marsh, 504; Kittering v. Parker, 8 Ind. 44; Danjean v. Blacketer, 13 La. An. 595.

[8] Harney v. Pack, 12 Miss. 229.

[9] Dalton v. Mitchell, 4 J. J. Marsh, 372; Fougeres v. Zacharie, 5 J. J. Marsh, 504; Marshall v. Green, 24 Ark. 410; vide Kane v. Drake, 27 Ind. 29.

[10] Bumpas v. Dotson, 7 Humph. 310.

[11] Ward v. Wehman, 27 Iowa, 279.

[12] Forsythe v. Matthews, 14 Penn. 100; McQuinnay v. Hitchcock, 8 Tex. 33; Kane v. Drake, 27 Ind. 29; Mattingly v. Walke, 2 Bradw. 169.

[13] Jenkins v. Einstein, 3 Biss. 128.

UNUSUAL MODE OF PAYMENT.—Whatever is out of the ordinary course in the mode, manner, or time of the payment of the alleged consideration is a mark of fraud. Precision and formality,[1] the pains taken to invite witnesses to see the sale made, and the bantering and negotiation about the price,[2] cautioning them to pay attention and recollect what they hear,[3] telling them that the transaction is fair,[4] a parade of payment in the presence of witnesses,[5] are signs of fraud, for when a part is overacted the delusion is broken and the fiction appears.

ABSENCE OF EVIDENCE.—The omission of the grantee[6] to testify, or to produce the debtor[7] or any other important witness,[8] or any important paper,[9] is the ground for an unfavorable presumption, and frequently exercises an important influence upon the final determination of the question of fraud.

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[1] Hartshorne v. Eames, 31 Me. 93.

[2] Goldsbury v. May, 1 Litt. 254; vide Crawford v. Kirksey, 55 Ala. 282.

[3] Adams v. Davidson, 10 N. Y. 309.

[4] Comstock v. Rayford, 20 Miss. 369; s. c. 9 Miss. 423.

[5] King v. Moon, 42 Mo. 551; Dorn v. Bayer, 16 Md. 144; Venable v. Bank, 2 Pet. 107; Dunlap v. Haynes, 4 Heisk. 476; Pickett v. Pipkin, 64 Ala. 920.

[6] Graham v. Furber, 78 E. C. L. 410; s. c. 14 C. B. 410; Glenn v. Glenn, 17 Iowa, 498; Newman v. Cordell, 43 Barb. 448; Devries v. Phillips, 63 N. C. 53; In re Hussman, 2 N. B. R. 437; Dunlap v. Haynes, 4 Heisk. 476; Henderson v. Henderson, 55 Mo. 534; Second Natl. Bank v. Yeatman, 53 Md. 443.

[7] Hale v. Saloon Omnibus Co. 4 Drew, 492; s. c. 28 L. J. Ch. 777; Blaisdell v. Cowell, 14 Me. 370; Glenn v. Glenn, 17 Iowa, 498; Peebles v. Horton, 64 N. C. 374; In re Hussman, 2 N. B. R. 437; Dunlap v. Haynes, 4 Heisk. 476; Henderson v. Henderson, 55 Mo. 534; Roche v. Hassard, 5 Ir. Ch. 14; Goshorn v. Snodgrass, 17 W. Va. 717.

[8] Cox v. Shropshire, 25 Tex. 113; Newman v. Cordell, 43 Barb. 448; Peebles v. Horton, 64 N. C. 374; Smith v. Brown, 34 Mich. 455; Harrell v. Mitchell, 61 Ala. 270.

[9] Nicol v. Crittenden, 55 Geo. 497.

PROOF OF PAYMENT OF CONSIDERATION.—The grantee need not prove the payment of the consideration until the fraudulent intent of the grantor is shown,[1] but when that is shown, it is incumbent on him to establish the payment by competent evidence, for the proof is almost exclusively within his knowledge and power.[2] He can not be altogether relieved from this duty, although he is illiterate.[3] The facility with which a fictitious payment may be fabricated renders it necessary for him to produce all the proof which may reasonably be supposed to be in his power of the reality and fairness of the transaction,[4] and the want of clear proof is evidence of fraud.[5] Such proof is vital to uphold a transfer in other respects surrounded with suspicion,[6] and this requirement is not met by the mere production of notes and receipts,[7] or the mere proof of payment without any attempt to show where the money came from,[8] how it was

[1] King v. Russell, 40 Tex. 124.

[2] Venable v. Bank, 2 Pet. 107; Callan v. Statham, 23 How. 477; Brandt v. Stevenson, 3 Phila. 205.

[3] Partridge v. Stokes, 44 How. Pr. 381; 66 Barb. 586.

[4] Hunt v. Blodgett, 17 Ill. 583; Vandall v. Vandall, 13 Iowa, 247; Godfrey v. Germain, 24 Wis. 410.

[5] Duvall v. Waters, 1 Bl. 569; s. c. 11 G. & J. 37; Dorn v. Bayer, 16 Md. 144; Schaferman v. O'Brien, 28 Md. 565; Callan v. Statham, 23 How. 477; Robbins v. Parker, 44 Mass. 117; Sands v. Hildreth, 14 Johns. 493; s. c. 2 Johns. Ch. 35; Brady v. Briscoe, 2 J. J. Marsh. 212; Harrison v. Campbell 6 Dana, 263; Purkitt v. Polack, 17 Cal. 327; Allen v. Bonnett, L. R. 5 Ch. 577; Enders v. Swayne, 8 Dana, 103; Venable v. Bank, 2 Pet. 107; Jones v. Read, 3 Dana, 540; Partridge v. Stokes, 44 How. Pr. 381; 66 Barb. 586; Draper v. Draper, 68 Ill. 17.

[6] Callan v. Statham, 23 How. 477; Gibbs v. Thompson, 7 Humph. 179; King v. Moon, 42 Mo. 551; Humphries v. Wilson, 2 Del. Ch. 331.

[7] Fulmore v. Burrows, 2 Rich. Eq. 95; Booker v. Worrell, 57 Geo. 235.

[8] King v. Moon, 42 Mo. 551; Venable v. Bank, 2 Pet. 107; Partridge v. Stokes, 44 How. Pr. 381; 66 Barb. 586; Hoxie v. Price, 31 Wis. 82; Henderson v. Henderson, 55 Mo. 534; Alexander v. Todd, 1 Bond, 175; Miller v. Sauerbier, 30 N. J. Eq. 71; Harrell v. Initrell, 61 Ala. 270; Carney v. Carney, 7 Baxter, 284.

obtained or whose it was,[1] or what was done with it.[2] Want of preciseness as to dates, time and amount excites suspicion, for the facts occurring in a suspicious transaction would naturally make an impression which would not be effaced from the memory very soon, and the testimony, if the transfer is recent, should be clear, accurate and specific.[3]

RELATIONSHIP.—Relationship is not a badge of fraud.[4] Fraud, however, is generally accompanied with a secret trust, and hence the debtor must usually select a person in whom he can repose a secret confidence. The sentiments of affection commonly generate this confidence, and often prompt relatives to provide for each other at the expense of just creditors. They are the persons with whom a secret trust is likely to exist. The same principle applies to all persons with whom the debtor has a confidential relation. Any relation which gives rise to confidence, though not a badge of fraud, strengthens the presumption that may arise from other circumstances, and serves to elucidate, explain, or give color to the transaction.[5] The doctrine applies to the relationship of father,[6]

[1] Jackson v. Mather, 7 Cow. 301; King v. Moon, 42 Mo. 551.

[2] King v. Moon, 42 Mo. 551; Alexander v. Todd, 1 Bond, 175.

[3] Newman v. Cordell, 43 Barb. 448; Hyde v. Sontag, 1 Saw. 249; Smith v. Brown, 34 Mich. 455.

[4] Copis v. Middleton, 2 Madd. 410; Merrill v. Locke, 41 N. H. 486; Sterling v. Ripley, 3 Chand. 166; Wrightman v. Hart, 37 Ill. 123; Dunlap v. Bournonville, 26 Penn. 72; Bumpas v. Dotson, 7 Humph. 310; Wilson v. Lott, 5 Fla. 305; Montgomery v. Kirksey, 26 Ala. 172; Kane v. Drake, 27 Ind. 29; Hempstead v. Johnstou, 18 Ark. 123; King v. Russell, 40 Tex. 124; Shearon v. Henderson, 38 Tex. 245.

[5] Brady v. Briscoe, 2 J. J. Marsh. 212; Wilson v. Lott, 5 Fla. 305; Montgomery v. Kirksey, 26 Ala. 172; Hanford v. Artcher, 4 Hill, 271; s. c. 1 Hill, 347; Bumpas v. Dotson, 7 Humph. 310; Reiger v. Davis, 67 N. C. 185; Marshall v. Croom, 60 Ala. 121; Harrell v. Mitchell, 61 Ala. 270; Sherman v. Hogland, 73 Ind. 472.

[6] Hartshorn v. Eames, 31 Me. 93; McIntosh v. Bethune, 8 Ired. 139; Poague v. Boyce, 6 J. J. Marsh. 70; Wheelden v. Wilson, 44 Me. 1;

mother,[1] father-in-law,[2] mother-in-law,[3] stepfather,[4] uncle,[5] brother,[6] sister,[7] brother-in-law,[8] sister-in-law,[9] wife,[10] hus-

Vandall v. Vandall, 13 Iowa, 247; Weaver v. Wright, 13 Rich. 9; Slattery v. Stewart, 45 Ill. 293; Forsyth v. Matthews, 14 Penn. 100; Scrivenor v. Scrivenor, 7 B. Mon. 374; Walter v. McNabb, 1 Heisk. 703; Hinton v. Curtis, 1 Pitts. L. J. 198; Farmer v. Calvert, 44 Ind. 209.

[1] Lloyd v. Williams, 21 Penn. 327; Splawn v. Martin, 17 Ark. 146; Gardinier v. Otis, 13 Wis. 460; Coley v. Coley, 14 N. J. Eq. 350; Sporrer v. Eifler, 1 Heisk. 633; Scott v. Winship, 20 Geo. 429.

[2] Borland v. Walker, 7 Ala. 269; Railroad Co. v. Kyle, 5 Bosw. 587; Bozman v. Draughan, 3 Stew. 243; Seymour v. Lewis, 16 N. J. Eq. 439; Wilson v. Horr, 15 Iowa, 489; Crawford v. Carper, 4 W. Va. 56; Planters' Bank v. Walker, 7 Ala. 926; Gordon v. Lowell, 21 Me. 251; Borland v. Mayo, 8 Ala. 104; Ryan v. Mullinix, 45 Iowa, 631; Embry v. Klemm, 30 N. J. Eq. 517.

[3] Harrison v. Campbell, 6 Dana, 263; Watson v. Kennedy, 3 Strobh. Eq. 1; Wilson v. Lott, 3 Fla. 305.

[4] Ames v. Gilmore, 59 Mo. 537.

[5] Felton v. White, 4 Jones (N. C.) 301; Wightman v. Hart, 37 Ill. 123; Demarest v. Terhune, 18 N. J. Eq. 45; Waterman v. Donalson, 43 Ill. 29.

[6] Hudgins v. Kemp, 20 How. 45; Callan v. Statham, 23 How. 477; King v. Moon, 42 Mo. 551; Chappel v. Clapp, 29 Iowa, 161; Green v. Tantum, 19 N. J. Eq. 105; s. c. 21 N. J. Eq. 364; Redfield Manf. Co. v. Dysert, 62 Penn. 62; Dewey v. Littlejohn, 2 Ired. Eq. 495; Hawkins v. Allston, 4 Ir. Eq. 137; Bredin v. Bredin, 3 Penn. 81; Millett v. Pottinger, 4 Met. (Ky.) 213; Smit v. People, 15 Mich. 497; Foster v. Grigsby, 1 Bush, 86; Pope v. Andrews, 1 S. & M. Ch. 135; Enders v. Swayne, 8 Dana, 103; How. v. Camp, Walker Ch. 427; Nesbit v. Digby, 13 Ill. 387; English v. King, 10 Heisk. 666; Schmidt v. Opie, 33 N. J. Eq. 138; Weisner v. Farnham, 2 Mich. 472; Johnston v. Dick, 27 Miss. 277; Craver v. Miller, 65 Penn. 456; Reed v. Carl, 11 Miss. 74; Steele v. Parsons, 9 Mo. 823; James v. Johnson, 22 La. An. 195; Hecht v. Koegel, 25 N. J. Eq. 135; Metropolitan Bank v. Durant, 22 N. J. Eq. 35; Chase v. Welsh, 45 Mich. 345.

[7] McRea v. Branch Bank, 19 How. 376; Kaine v. Weigley, 22 Penn. 179; Copenheaver v. Huffacker, 6 B. Mon. 18; Sayre v. Fredericks, 16 N. J. Eq. 205; Sporrer v. Eifler, 1 Heisk. 633.

[8] Schaferman v. O'Brien, 28 Md. 565; Merrill v. Locke, 41 N. H. 486; Jackson v. Brush, 20 Johns. 5; Copenheaver v. Huffacker, 6 B. Mon. 18; Tubb v. Williams, 7 Humph. 367; Farmers' Bank v. Douglass, 19 Miss. 469; Burtus v. Tisdall, 4 Barb. 571; Satterwhite v. Hicks, Busbee, 105; Planters' Bank v. Walker, 7 Ala. 926; Wilson v. Butler, 3 Munf. 559; Dalton v. Mitchell, 4 J. J. Marsh. 372; Venable v. Bank, 2 Pet. 107; Kaine v. Weigley, 22 Penn. 179; Steele v. Ward, 25 Iowa, 535; Steere v. Hoagland, 39 Ill. 264; Gibbs v. Thompson, 7 Humph. 179; Barrow v. Bailey,

band,[1] son,[2] daughter,[3] son-in-law,[4] cousin,[5] nephew,[6] step-

5 Fla. 9; Bray v. Hussey, 24 Ind. 228; Burke v. Murphy, 27 Miss. 167; Bulkley v. Buffington, 5 McLean, 457; Hunt v. Knox, 34 Miss. 655; Sayre v. Fredericks, 16 N. J. Eq. 205; Smith v. Duncan, 2 Pitts. L. J. 186; Alexander v. Todd, 1 Bond, 175; Harkins v. Bailey, 48 Ala. 376; Swift v. Lee, 65 Ill. 336; Crawford v. Kirksey, 50 Ala. 591; Goshorn v. Snodgrass, 17 W. Va. 717.

[9] Smith v. Henry, 2 Bailey, 118; s. c. 1 Hill, 16; Young v. Stallings, 5 B. Mon. 307; Walcott v. Almy, 6 McLean, 23.

[10] Clarke v. McGeihan, 25 N. J. Eq. 423.

[1] Tyberant v. Raucke, 96 Ill. 71.

[2] Duvall v. Waters, 1 Bland, 569; s. c. 11 G. & J. 37; Farnsworth v. Bell, 5 Sneed, 531; Gibson v. Hill, 23 Tex. 77; Glenn v. Glenn, 17 Iowa, 498; Trimble v. Ratcliff, 9 B. Mon. 511; s. c. 12 B. Mon. 32; Ringgold v. Waggoner, 14 Ark. 69; Law v. Smith, 4 Ind. 56; Jones v. Read, 3 Dana, 540; Shiveley v. Jones, 6 B. Mon. 274; Sheppard v. Iverson, 12 Ala. 97; Basey v. Daniel, 1 Smith, 252; Dick v. Grissom, 1 Freem. Ch. (Miss.) 428; Halbert v. Grant, 4 Mon. 580; Brady v. Briscoe, 2 J. J. Marsh. 212; Middleton v. Sinclair, 5 Cranch C. C. 409; Bean v. Smith, 2 Mason, 252; Sands v. Codwise, 4 Johns. 536; Jessup v. Johnson, 3 Jones (N. C.) 335; Carter v. Carpenter, 7 Bush, 257; Tripp v. Childs, 14 Barb. 85; Lewis v. Love, 2 B. Mon. 345; Jackson v. Spivey, 63 N. C. 261; Chappel v. Clapp, 29 Iowa, 161; Shearon v. Henderson, 38 Tex. 245; Dunlap v. Haynes, 4 Heisk. 476; Herkelrath v. Stookey, 63 Ill. 486; King v. Russell, 40 Tex. 124; Jaffers v. Aneals, 91 Ill. 487; Knowlton v. Hawes, 10 Neb. 534; Fleming v. Hiob, 3 Bradw. 390; King v. Hubbell, 42 Mich. 597; Hoboken Bank v. Beekman, 33 N. J. Eq. 58; Horn v. Wiatt, 60 Ala. 297; Marshall v. Croom, 60 Ala. 121; Stevens v. Dillman, 86 Ill. 233; Barnard v. Davis, 54 Ala. 565; Massie v. Engart, 32 Ark. 251; Hillsman v. Blackwell, 10 Heisk. 480; Fleischer v. Dignon, 53 Iowa, 288.

[3] Foster v. Woodfin, 11 Ired. 339; Haney v. Nugent, 13 Wis. 283; Marshall v. Green, 24 Ark. 410; Parsons v. McKnight, 8 N. H. 35; O'Connor v. Bernard, 2 Jo. 654; Clairborne v. Goss, 7 Leigh, 331; Hart v. Flinn, 36 Iowa, 366; Hubbard v. Allen, 59 Ala. 283; Marshall v. Croom, 60 Ala. 121.

[4] Duvall v. Waters, 1 Bland, 569; s. c. 11 G. & J. 37; Black v. Cadwell, 4 Jones (N. C.) 150; Rollins v. Mooers, 25 Me. 192; Garland v. Rives, 4 Rand. 282; Merry v. Bostwick, 13 Ill. 398; Hook v. Mowre, 17 Iowa, 195; Jackson v. Mather, 7 Cow. 301; Tompkins v. Nichols, 53 Ala. 199; Bell v. Devere, 96 Ill. 217.

[5] Blodgett v. Chaplin, 48 Me. 322; Nelson v. Smith, 28 Ill. 495.

[6] Phettiplace v. Sayles, 4 Mason, 312; Copis v. Middleton, 2 Madd. 410; Langford v. Fly, 7 Humph. 585; Bibb v. Baker, 17 B. Mon. 292; Davis v. Gibbon, 24 Iowa, 257.

son,[1] grandson,[2] partners,[3] and confidential friend,[4] or agent.[5] Wherever this confidential relation is shown to exist, the parties are held to a fuller and stricter proof of the consideration,[6] and of the fairness of the transaction.[7]

DELAY.—Mortgages and deeds of trust encumber the property which they cover, and thus in many instances embarrass the grantor's creditors in their efforts to subject it to the payment of their demands. If such instruments, however, are executed in good faith, the delay and hinderance that are merely incidental to the accomplishment of the object which the parties have in view, or arise merely from a desire to have the property when sold bring the best price that can reasonably be obtained under all the circumstances, or result from a subsequent reluctance on the part of the mortgagee or trustee to embarrass, oppress or ruin the grantor, will not invalidate them or constitute a just ground of complaint on the part of creditors. A deed of trust or mortgage may for this reason contain a stipulation that the mortgagor or trustee shall retain or keep possession of the property until the *cestui que trust* or mortgagee, as the case may be, desires to take posses-

[1] Marlow v. Orgill, 8 Jur. (N. S.) 829.

[2] Smith v. Daniel, 1 Smith, 252; Basye v. Daniel, 1 Ind. 378.

[3] Thompson v. Drake, 3 B. Mon. 565; Strong v. Hines, 35 Miss. 201.

[4] Gibbs v. Thompson, 7 Humph. 179; Yoder v. Standiford, 7 Mon. 478; Wells v. Thomas, 10 Mo. 237; Paxton v. Boyce, 1 Tex. 317.

[5] Clark v. French, 23 Me. 221; Cooke v. Smith, 3 Sandf. Ch. 333; Smead v. Williamson, 16 B. Mon. 492; Kinder v. Macy, 7 Cal. 206; Stanton v. Green, 34 Miss. 576; Bridge v. Loeschigk, 42 N. Y. 421; 42 Barb. 171; Danby v. Sharp, 2 Me. Arthur, 435.

[6] Dick v. Grissom, 1 Freem. Ch. (Miss.) 428; Hawkins v. Allston, 4 Ired. Eq. 137; Satterwhite v. Hicks, Busbee, 105; Brady v. Briscoe, 2 J. J. Marsh. 212; Brice v. Meyers, 5 Ohio, 121.

[7] Jenkins v. Pearce, 1 Jones (N. C.) 413; Black v. Cadwell, 4 Jones (N. C.) 150; Bowman v. Houdlette, 18 Me. 245; Lloyd v. Williams, 21 Penn. 327.

sion or requests that the property shall be sold.[1] The instrument may even contain a stipulation that the debtor may remain in possession for a certain period, unless an execution shall in the mean time be issued against him.[2] A deed of trust may also allow a liberal discretion to the trustee in the disposition of the property, both as to the time and as to the manner of making the sale.[3] A provision that the property shall be sold before the time stipulated for a sale, if the grantor desires it, does not render the deed void.[4] If the debtor does not retain the possession of the property, a delay of three years may be allowed.[5] Mere delay in enforcing a mortgage or deed of trust is simply a circumstance to be taken into consideration,[6] for the creditors may proceed to collect their demands from the property if its value exceeds the amount secured by the mortgage or deed of trust, without waiting for the party who holds such security to cause a sale to be made. As the creditors are not materially injured by the delay, they have no legal grounds to complain on account of the compassion or humanity of the mortgagee or trustee, or on account of a desire, if such exists, to prevent a sacrifice of the property for the purpose of protecting the interests of the party who holds such security.

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[1] Dubose v. Dubose, 7 Ala. 235; Brock v. Headon, 13 Ala. 370; Marriott v. Givens, 8 Ala. 694.

[2] Alton v. Harrison, L. R. 4 Ch. Ap. 622; Lee v. Flannagan, 7 Ired. 471; Prior v. White, 12 Ill. 261; Frost v. Mott, 34 N. Y. 253.

[3] Brock v. Headon, 13 Ala. 370; Burgin v. Burgin, 1 Ired. 453; Walthall v. Rives, 34 Ala. 91; Tarver v. Roffe, 7 Ala. 873; Sipe v. Earman, 26 Gratt. 563.

[4] Sipe v. Earman, 26 Gratt. 563.

[5] Starke v. Etheridge, 71 N. C. 240.

[6] Galt v. Dibrell, 10 Yerg. 146; Davis v. Evans, 5 Ired. 525; Ely v. Carnley, 3 E. D. Smith, 489; Harshaw v. Woodfin, 64 N. C. 568; Lee v. Flannagan, 7 Ired. 471; Hardy v. Skinner, 9 Ired. 171; Burgin v. Burgin, 1 Ired. 453; Dewey v. Littlejohn, 2 Ired. Eq. 495; Feurt v. Rowell, 62 Mo. 524.

CHAPTER V.

POSSESSION.

PRELIMINARY REMARKS.—The history of the law respecting the rights of creditors in relation to the property of their debtor, sold, assigned or mortgaged by him, but remaining in his possession and under his control, is remarkable. It presents a perpetual struggle between a general rule of policy, on one side, intended to cut off the possibility of fraudulent or collusive sales, prescribing that every sale, assignment or mortgage unaccompanied by change of possession should be held fraudulent in the eye of the law and void against creditors, and, on the other side, the obvious hardship and injustice of numerous particular cases, where the innocent and even benevolent intention of the party was manifest, and the legal presumption of fraud appeared inequitable, oppressive, contrary to the truth of the case and the moral feelings of those who must apply and enforce the law. Thus it happened, that whilst the courts and the books laid down the rule broadly and often applied it strictly, that unless possession accompanies and follows the transfer it is fraudulent and void, yet, first case after case, and then class after class of exceptions was exempted from the rule, until there were numerous distinct grounds of exemption, such as the kind of sale, purchase under execution or distress for rent, necessity, convenience, the customs of trade, the distance or situation of the place, the relation of the parties, motives of humanity or of friendship, and special circumstances of various kinds, more or less definitely defined, and eventually the rule itself was abrogated in

many States.[1] A point which has been so extensively

[1] Stoddard v. Butler, 20 Wend. 507; 7 Paige 163, per Senator Verplanck. In a note to Bissel v. Hopkins, 3 Cow. 166, the number of the exceptions is stated to be twenty-four, the principal of which are as follows: 1. Where a creditor is knowing and assenting to the sale (Steel v. Brown, 1 Taunt. 381). 2. Where the sale is conditional (per Coke, J., in Stone v. Grubbam, 2 Bulstr. 217; 1 Rol. Rep. 3, and per Buller, J.. in Edwards v. Harben, 2 T. R. 587), *i. e.* in the last case a condition precedent to be performed by the vendee. 3. Where the goods remain with the vendor to be sold for the benefit of the vendee, the vendor being a borrower on bottomry (*i. e.* a mortgagor), the trust being declared by the deed (Bucknal v. Roiston, Prec. Ch. 285). 4. Where A. purchases the goods on a *fi. fa.* and leaves them with the judgment-debtor, to the intent that he pay for and redeem them (Cole v. Davies, 1 Ld. Raym. 724). 5. Where the goods purchased in this *manner* are left from benevolence or for a temporary and honest purpose (Kidd v. Rawlinson, 2 B. & P. 59; 3 Esp. 52). 6. Where money is lent to buy furniture, and a bill of sale honestly taken to secure the repayment of the money (Meggott v. Mills, 1 Ld. Raym. 286; 12 Mood. 159). 7. Where the purchase was a fair one at public sale, and the goods are left with a relation or friend (per Shippen, Ch. J., in Walters v. McLellan, 4 Dall. 208). 8. Where the vendor is an intended husband, and sells to trustees to make a marriage settlement upon his future wife (Hazelinton v. Gill, 3 T. R. 620, *in notis;* 3 Doug. 415; Cadogan v. Kennett, 2 Cowp. 432). 9. Where a bill of sale is a mortgage (Barrow v. Paxton, 5 Johns. 258; U. S. v. Hooe, 3 Cranch, 73). 10. Where the non-delivery arises from the sickness of the vendor's depositary (Beals v. Guernsey, 8 Johns. 446). 11. Where the assignment is of a cargo in a ship lying at a port where the assignment is executed, but bound to a foreign port, the assignment providing that remittances shall be made to liquidate the debt due to the vendee in consideration of which debt the assignment is made, &c. (Dawes v. Cope, 4 Binn. 258). 12. Where the conveyance was late on Saturday night, and the possession remained unchanged till Monday (Wilt v. Franklin, 1 Binn. 502). 13. A purchase by a creditor in an execution (Watkins v. Birch, 4 Taunt. 823). 14. A purchase under a landlord's warrant of distress (Guthrie v. Wood, 1 Starkie, N. P. 367). 15. A ship abroad may of course be sold and possession retained by the vendor till her return (Putnam v. Dutch, 8 Mass. 287). 16. A *bona fide* sale of bricks in a brick-yard, accompanied with a lease of the yard to the vendee until the bricks should be sold and removed, was held to be valid against the creditors of the vendor without actual removal (Allen v. Smith, 10 Mass. 308).

litigated will be best understood by an examination, in the first place, of the principles that are involved, and then of the authorities.

Depends upon the Intent.—The question arises upon the construction of a positive statute, and a true solution cannot be attained without carefully considering the terms of the act. The statute is directed, not against an inconsistent possession, but a fraudulent design, not against fair and honest contracts, but conveyances made with the intent to delay, hinder or defraud creditors.[1] The intent of the debtor is, therefore, by the very terms of the act, the true and legitimate object of inquiry and judicial investigation. If the fraudulent intent is present, the conveyance is void; if it is absent, the conveyance is valid. All the circumstances that accompany a transaction are valuable only as they throw light upon the debtor's intent.

Vendor's Right to Leave with Vendee.—A full and free power of disposal of chattels is an essential and inherent incident of ownership, and the vendee has the same right to leave them in the possession of the vendor that he would have to take them into his own, or place them in possession of a third person,[2] unless such act necessarily and inevitably tends to deceive and defraud creditors. The argument that the retention of possession is fraud *per se* cannot rest upon the incompleteness of the purchaser's title, for in sales of personal property actual

[1] Davis v. Turner, 4 Gratt. 422; Hobbs v. Bibb, 2 Stew. 54; Bryant v. Kelton, 1 Tex. 415.

[2] Hanford v. Artcher, 4 Hill, 271; s. c. 1 Hill, 347.

delivery is not necessary to the transmission of the title.[1] By the contract of sale and present payment of the price, or an agreement to pay it thereafter, the purchaser acquires the right of property, and may recover it by action. Thus, if A. sells property to B. *in præsenti*, and receives payment therefor, or B.'s note or promise to pay at a future day, the title passes from A. and becomes vested in B., and is not affected by the failure of A. to deliver or of B. to demand the immediate possession. Now, as the dominion over a man's property belongs to him, and not to his creditors, they ought to be allowed to subject to their demands only the right which remains in him, and not that from which he has lawfully parted.[2]

Possession by Vendor is Badge of Fraud.—The want of possession, however, is a strong badge of fraud. The property is placed in the purchaser, the possession continues in the debtor, and by that means creditors, perceiving no visible diminution of the debtor's effects, rest satisfied, and take no measures to secure their debts, until, perhaps, the whole estate of the debtor is exhausted, whereas, should the vendee immediately take possession, creditors would thereby have notice that the debtor's estate was wearing away, and apply for the discharge of their demands in time. It has this further ill effect, that the debtor, still continuing in possession and being reputed owner, obtains credit upon a belief that he is the owner, and so by the fault of the vendee possesses the means of contracting debts without the means of paying them.[3] As it is out of

[1] Cole v. White, 26 Wend. 511; s. c. 24 Wend. 116.
[2] Davis v. Turner, 4 Gratt. 422.
[3] Ingles v. Donalson, 2 Hayw. 57; Ludlow v. Hurd, 19 Johns. 218.

the ordinary course of business for a person to buy goods and not to receive the possession, a sale without a change of possession enables the vendor to hold out false colors and obtain a false credit, by inducing others to trust him on account of his apparent property, and may be used to protect secret transfers. It, therefore, has a direct tendency to deceive and defraud creditors, and, as the law always holds that a person intends whatever is the natural and probable consequence of his own acts, raises a presumption that the vendor intends to defraud his creditors.[1]

NOT CONCLUSIVE.—Although the retention of possession is for these reasons presumptive evidence of fraud, yet it is not conclusive, because possession is only *prima facie* evidence of title to personal property. How far it would have been wise to have determined originally that the actual possession should be considered as decisive evidence of all property is a question now too late to be discussed, because as far back as the Year Books,[2] a gradual was limited to A. for life, and afterwards to B. In modern times the courts, proceeding upon the same principle, have said that personal property may be carved out in the same manner and possession given to one for life and then over,[3] and it is now settled law that possession is only presumptive evidence of ownership.[4] The frequent necessity of intrusting personal estate to others than the actual owner —to clerks, domestics, factors, mechanics and borrowers— forbids the adoption of the rule that possession shall

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[1] Griswold v. Sheldon, 4 N. Y. 580.

[2] 37 Hen. VI, 30.

[3] Jarman v. Wooloton, 3 T. R. 618; Haven v. Low, 2 N. H. 13.

[4] And there was no occasion otherwise for the statute of King James, Stat. 21 Jac. I, 19, ss. 10, 11; Arundell v. Phipps, 10 Ves. 139.

always be deemed conclusive evidence of title.[1] But the line of distinction between presumptive and conclusive evidence of fraud is clearly drawn. If the inevitable consequence of an act is to defraud creditors, then that act is conclusive evidence of fraud. But if the tendency to defraud is only a natural and probable and not an inevitable consequence of an act, then that act is only presumptive evidence of fraud. As possession is only presumptive evidence of title, the retention of possession has only a probable tendency to deceive, and is therefore only presumptive evidence of an intent to defraud.

Caveat Creditor.—In purchases of personal property the rule *caveat emptor* applies, though the vendor may be in possession, and it is no harsher to apply a similar rule of *caveat* creditor.[2] Before giving credit he should diligently inquire as to the title of the property in the possession of the debtor. When he makes proper inquiry he may ascertain that the naked fact of possession after a sale is the only indication of fraud, and that even this indication is weakened by clear evidence of a full consideration, perfect publicity in the sale and little prior indebtedness on the part of the vendor. He may find that there was an express condition in the sale itself for a loan of the property to the vendor, and, considering the nature of the property and the character and situation of the parties, that this condition ought not to cast any suspicion on the transaction. Thus, cases will occur to every one where property may be honestly loaned for a time to the vendor from mere charity; other cases for hire, and others still

[1] Haven v. Low, 2 N. H. 13.

[2] Haven v. Low, 2 N. H. 13; Davis v. Turner, 4 Gratt. 422; Sydnor v. Gee, 4 Leigh, 535.

for the property to be repaired, freighted, or manufactured. In others it may be left with the vendor from simple procrastination as to its removal, and in others because the property is of so ponderous a nature as to render a speedy removal inconvenient in the usual course of business. The length of time it is left or loaned, whether for hours, months or years, would frequently much strengthen or weaken any presumption of fraud.[1] It is, moreover, vain to attempt to so arrange the possession of personal property as altogether to prevent frauds upon creditors. Some circumspection and vigilance must be demanded of them. The most common transactions of life would be trammeled and embarrassed if the sole care were directed to the protection of creditors who ought to protect themselves.[2]

RULE OF EVIDENCE.—It can not be denied that the retention of possession is a circumstance which does not lead necessarily to the giving of a delusive credit to the vendor, and sometimes happens not to be irreconcilable with a fair and honest contract free from all imagination of fraud.

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[1] Haven v. Low, 2 N. H. 13. The rule that possession should be deemed conclusive evidence of title would not be any more effective to suppress fraud. If by the inquisitions of the judicial crucible a transaction, both honest and fair, may be alloyed until it is dishonest and fraudulent, by the inverse power of transmutation, a fraud may be refined until it is equivalent to honesty and truth. If truth may become constructive falsehood, by the same rule falsehood may become constructive truth. If the possession of personal chattels is or ought to be conclusive evidence of ownership, it is also, or ought to be, conclusive evidence that a person not in possession is not the owner. All, then, that remains for the fraudulent debtor to do, who would conclusively place his chattels beyond the reach of execution, is to place them in the possession of his friend, against whom no process has been issued. (Stoddard v. Butler, 20 Wend. 507, per Senator Dickinson.)

[2] Sydnor v. Gee, 4 Leigh, 535; Davis v. Turner, 4 Gratt. 422.

If, therefore, the object is to ascertain the merits of the case, it would seem that to hold the inference conclusive, and in effect an estoppel to all further investigation, would be against the plainest principles of presumptive evidence.[1] The rule that the retention of possession is a fraud *per se* is accordingly conceded to be one of policy and not of evidence, and it is admitted that upon no other ground can a court be justified in holding a sale fraudulent *per se* which to a jury is proved to be *bona fide*, and in fact free from the imputation of any fraud.[2] If the statute were ambiguous or doubtful, then the courts in construing it might be governed by motives of policy; but where the statute is so plain and explicit there is no room for such considerations. The courts can only look for the fraudulent intent. If that is present, the transaction is void; if that is absent, it is valid. Such are the imperative terms of the act. To disregard its terms and enter into a consideration of the requirements of public policy, is to give no heed to the mandates of the statute and to usurp legislative functions. Questions of policy belong peculiarly to legislative bodies; questions of law are proper subjects for the determination of the courts.[3]

Ensnares Innocent Men.—The doctrine that the retention of possession is a fraud *per se* has, however, been

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[1] Davis v. Turner, 4 Gratt. 422.

[2] Wilson v. Hooper, 12 Vt. 653; Kirtland v. Snow, 20 Conn. 23.

[3] Hanford v. Artcher, 4 Hill, 271; s. c. 1 Hill, 347. The difference between policy as laid down by a legislature and policy as enforced by courts is well illustrated by the difference in their mode of treating this subject. The latter prohibits all transactions where the vendor retains possession, while the former simply corrects the evil by requiring that there shall be an instrument in writing duly recorded, and obtains all the benefits that can be derived from the retention of possession.

supposed to have the advantage of simplicity, since it has been believed to afford a ready and easy solution to all questions coming within its range. But this supposed advantage is purchased at too dear a price. It is often obtained by a sacrifice of the justice of the case. How can it be otherwise when, in deciding a case, the correct decision of which depends on the good or evil intent of the parties, one single circumstance is arbitrarily seized on, and made conclusive evidence of evil intent, to the total exclusion of every circumstance which would prove good intent?[1] In seeking to catch rogues, the law ought not to ensnare honest men. It may become so zealous against fraud as to restrain the free action of honesty, a result that would be most disastrous. Better is it that many frauds should go undetected, than that the means of detection or prevention should treat honest men as guilty, or teach men to be always suspicious of their neighbors, and watchful that honest acts be precisely measured according to the standard of legal morality.[2]

Simplicity not Attained.—This supposed advantage of simplicity does not in fact exist. No one can glance at the confused mass of authorities upon this subject without perceiving that what was intended as a safe and easy guide to the detection and suppression of frauds has only led to an endless maze of disputation. There is scarcely a

[1] "In my long experience, I have had occasion to observe the mischievous operation of the rule, for under its application I have found myself compelled, as judge, to pronounce transactions to be fraudulent and void as to creditors which were known to be perfectly fair and *bona fide*, and were not intended or calculated to delay, hinder, or defraud creditors." (Davis v. Turner, 4 Gratt. 422, per Cabell, J.)

[2] To be strict as to the tithe of mint, anise, and cummin, and forgetful of the weightier matters of social duty. (Hugus v. Robinson, 24 Penn. 9.)

proposition in regard to the essence or the application of the doctrine upon which there may not be found a conflict of authorities. Those who doubt the truth of this will be best convinced by exploring the field of authority. The doctrine, though plausible, is extremely difficult in practice. It seeks to make a mere question of law of that which, in the nature of things, is a mixed question of law and fact, and carries within itself the elements of perplexity and contrariety.[1] The numerous exceptions which have been made to the operation of the rule are, moreover, attended with the practical inconvenience of multiplying collateral issues, both of law and of fact, without throwing any light upon the truth and justice of the cause. They involve questions of practicability, disability, diligence and notice, upon which the case may be made to turn, irrespective of the fairness and good faith of the transaction. It is, moreover, somewhat remarkable that a person should be convicted of a fraud upon a nice question whether he has used reasonable diligence or given due notice.[2]

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[1] Davis v. Turner, 4 Gratt. 422. In those courts where the doctrine of fraud *per se* is held, it has accordingly been found that there are no more difficult and embarrassing questions than those which relate to the respective provinces of the court and of the jury to determine what is law and what is fact. One of the questions upon which difficulty has arisen is fraud in the sale or transfer of chattels under 13 Eliz. c. 5. (McKibbin v. Martin, 64 Penn. 352.)

[2] Davis v. Turner, 4 Gratt. 422. These exceptions must multiply as the exigency of circumstances may require, until ultimately they destroy the rule itself, or, what is the same thing, reduce it to one that is only *prima facie*. Indeed, it seems impracticable to preserve unbroken any rule of inflexible rigor upon the subject, however inexorable in its terms, for the mind is apt to revolt against the despotism of a judicial dogma that oppresses the truth and justice of a cause, or to seek refuge in subtle distinctions, as artificial as the rule itself.

Looks only to Form.—There is also another grave objection to the rule. It goes to the form rather than the substance of the transaction, and, consequently, may be readily evaded. In simulated contracts it is easy to mould the conveyance so as to avoid the discrepancy. Nothing more is necessary than to give to the transaction the form of a sheriff's sale, or of any of the other admitted exceptions to the rule. The very notoriety which in case of public sales may be properly relied on as evidence to repel the imputation of fraud, is sometimes resorted to as a mere disguise; for example, goods may be purchased in at a sheriff's sale in the name of a confederate, with funds furtively furnished by or on the part of the embarrassed debtor.[1] The truth of the matter is that the doctrine has been prompted by a commendable wish to accomplish a desirable but impracticable object. If a short and easy mode could be found of cutting fraud up by the roots, the discovery would be invaluable; but such an enterprise is beyond the limits of human wisdom. In human institutions, moreover, the question is not whether every evil contingency can be avoided, but what arrangements will be productive of the least inconvenience. But, even as the test of a fraudulent purpose, the rule in question has no claim to certainty; on the contrary, it concedes its own fallibility by crushing mercilessly the most convincing evidence of fairness and good faith.[2]

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[1] Davis v. Turner, 4 Gratt. 422. It was accordingly found necessary in New York, to hold that the retention of possession after a sheriff's sale is *prima facie* evidence of fraud. (Farrington v. Caswell, 15 Johns. 430; Taylor v. Mills, 2 Edw. Ch. 318; Gardinier v. Tubbs, 21 Wend. 169; Fonda v. Gross, 15 Wend. 628.)

[2] Davis v. Turner, 4 Gratt. 422; Stoddard v. Butler, 20 Wend. 507; 7 Paige, 163, per Senator Dickinson.

Not Good Policy.—Even on the simple ground of policy—the only ground on which it can by any possibility be sustained—the rule is open to grave objections. It restricts the free circulation of personal property, hampers the spirit of commerce, checks the generous impulses of the heart, and prohibits the charities of life. The farmer or mechanic finds it necessary to sell his implements of husbandry or the tools of his trade, yet he can not retain the possession, although they are the only means of support for himself and family.[1] A minister of the gospel can not retain the horse that is essential to the performance of his duties.[2] Machinery must be removed from the manufactory.[3] The vendor can not even be permitted to finish the articles which are in the process of manufacture.[4] A man can not purchase chattels, and leave them with a feeble relative for the sake of comfort and assistance.[5] If the vendor and vendee live in the same house, there can not be a valid sale of the furniture in it without a removal.[6]

Commerce Promoted.—Illustrations of the danger of false credit and fraudulent evasion of debt, whenever delivery and change of possession do not accompany and

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[1] Doane v. Eddy, 16 Wend. 523.

[2] Doane v. Eddy, 16 Wend. 523.

[3] Swift v. Thompson, 9 Conn. 63; Tobias v. Francis, 3 Vt. 425.

[4] Carter v. Watkins, 14 Conn. 240.

[5] The law which regards and scans with scrupulous vigilance every circumstance from which a legitimate inference of fraud or unfairness may be drawn, is, at the same time, not so wanting in humanity as to forbid the alleviation of distress and suffering by honest means. To hold such a transaction inconsistent with good faith or the rights of the creditors would be to stamp as a fraud what, by the law of God as well as by the common consent of mankind, is esteemed as a virtue. (Henderson v. Mabry, 13 Ala. 713; Mauldin v. Mitchell, 14 Ala. 814.)

[6] Steelwagon v. Jeffries, 44 Penn. 407.

follow change of property, and of the modes in which such frauds can be effected, can be readily furnished, and their truth can not be denied. Yet this is but one, and that the narrowest side of the question; whilst it is also that view of the matter which is most frequently, indeed almost exclusively presented to the examination of courts. But a glance at the daily business of life out of court presents another aspect of the question. Transactions in which the goods are left in the possession of the vendor have grown out of the usages of modern society, the necessities of commerce, the conveniences of daily life, and the wants and usages of trade and industry. They have followed in the train of commerce, credit and enterprise. Like them, they have been largely productive of benefits to society. Yet those benefits, like the results of all other human actions, are not unmixed with evil. By such means, the adventure, capacity, requirements and industry of the young or the needy have been aided and stimulated; large concerns of honorable but unfortunate merchants have been settled to the greatest advantage of the creditors and the least possible loss to the insolvent, and the kindness of parents or the generosity of friends has been enabled to preserve the comforts of a home to the wife and children of a bankrupt, without the slightest injury or fraud to creditors. Society reaps nothing but unquestioned benefit from nine-tenths of such transactions occurring in actual life. The other tenth may come before the courts. It is not then at all surprising that this different experience should give a different character to the whole in different minds. It is thus as to all the operations of commerce beyond mere barter and buying and selling for cash.[1]

[1] Cole v. White, 26 Wend. 511, per Senator Verplanck.

Rights of Others besides Creditors.—Since the retention of possession may in a multitude of cases be beneficial and advantageous, there is another consideration that is entitled to great strength. Neither the legal nor the moral code should be administered for the sole benefit of creditors. They become creditors by their own volition, and have abundant means for their own protection. General creditors ought not to be placed upon a superior footing to him who furnishes his poor neighbor with a cow to nourish his children or a team to sow his crop or gather in his harvest. If the commercial interest can not be sustained without trampling upon all others, and the ordinary charities of life besides, the sooner it finds its level the better. It is an idle dream to suppose that the cause of morals can be advanced by establishing a rule which ministers to the mercenary passions at the expense of the benevolent affections, or that the fountain of justice will send forth purer streams if they are forced to flow through artificial channels. The principles of law are but the enlightened and just conclusions of a moral people pronounced by their own tribunals. There ought not, therefore, to be two standards of morals, the one for courts of justice, and the other for the people in their ordinary intercourse, and when the law seeks to erect a standard of its own, it abandons its own proper province and attempts an impossible task. Honesty can not be divided into chapters, nor morality defined by sections.[1]

Prima facie Evidence may be Explained.—The doctrine that the retention of possession will, under all circumstances, render a transfer of personal property fraudu-

[1] Stoddard v. Butler, 20 Wend. 507, per Senator Dickinson.

lent and void has not been laid down by any court, nor adopted anywhere. There are admitted exceptions to the rule, varying in number and character according to the strictness with which the rule is administered. But evidence is either *prima facie* or conclusive. If evidence is liable to be contradicted or explained, it is only *prima facie*, but conclusive evidence can not be contradicted. *Prima facie* evidence, although it admits the possibility of its falsity, yet is conclusive unless contradicted or explained. Conclusive evidence admits no such possibility of falsity. It is absolute verity. Any evidence which may be explained is not conclusive, but only *prima facie*. If, therefore, there are special cases in which special reasons may be given to show the fairness of the transactions, notwithstanding the retention of possession, those reasons must be shown by evidence, and the nature of that evidence constitutes the case a special one within the rule. This evidence may be given in every case where it exists. It follows, then, that in every case the vendee may, if he can, show by evidence special reasons to take his case out of the general rule. The fact of possession in the vendor, as it may be explained, is, therefore, not conclusive, but only *prima facie* evidence of fraud.[1]

EXPLANATORY EVIDENCE IS FOR JURY.—The real point of inquiry therefore is, not whether the retention of possession is presumptive or conclusive evidence of fraud, but whether the evidence in explanation of it is, in an action at law, for the consideration of the court or the jury. It is held in many cases that although the retention of possession is only presumptive evidence of fraud, the special

[1] Hall v. Tuttle, 8 Wend. 375.

reasons which are permitted to take a case out of the rule must be shown to and approved of by the court.[1]

The presumption of fraud, however, arising from the retention of possession, is simply a presumption of an intent to hinder, delay and defraud creditors, and consequently is a presumption of a fact. It is true that the presumption is raised by the law, but only on the same principles on which presumptions are raised in other transactions. It is simply a presumption of a fact raised by the law, a legal evidence of fraud, conclusive in the absence of contradictory testimony, but open to refutation. It is only such a presumption that, unless contradicted or explained, the jury ought to believe it. The whole burden of proof is thrown upon the grantee, and he must make it appear that he acted in good faith. It is strictly under the statute a question of fact, such as a jury may judge of, and must alone do so if the question comes before a court of common law.[2]

Court can not Determine Sufficiency of Explanatory Evidence.—The statute has not given the court any power to determine what particular facts shall or shall not be sufficient evidence of honest intention, nor can it be derived from the acknowledged right to reject incom-

[1] Divver v. McLaughlin, 2 Wend. 596; Collins v. Brush, 9 Wend. 198; Coburn v. Pickering, 3 N. H. 415; Toby v. Reed, 9 Conn. 216; Carter v. Watkins, 14 Conn. 240; Planters' Bank v. Borland, 5 Ala. 531; Trask v. Bowers, 4 N. H. 309; Mauldin v. Mitchell, 14 Ala. 814.

In Connecticut the practice is slightly different. It is not according to the course of the court to call this a fraud *per se* and to direct the jury to find the sale void, but the question is submitted to the jury as a question of fact, with instruction that if they find none of the established exceptions, they will find the transaction fraudulent. (Swift v. Thompson, 9 Conn. 63.) But in Toby v. Reed, 9 Conn. 216, the term court was held to mean the jury acting under the direction of the court.

[2] Stoddard v. Butler, 20 Wend. 507, per Senator Verplanck.

petent evidence, for this does not imply the right to exclude proof of such facts as by the ordinary laws of evidence and the common understanding of men go to prove honest intent, or to disprove deceit and collusion, merely because in the view of the court such evidence is not absolutely and in all cases demonstrative proof. It does not authorize the court to create a general rule of policy, declaring that certain facts which are not always of necessity incompatible with collusion shall never in any case be received as proof of good faith. This is in effect to declare that the question of intent shall be wholly a question of law. This intent to hinder, delay or defraud is a moral or intellectual fact, to be inferred by the jury from such external facts and circumstances as in the ordinary course of life would satisfy men of sound judgment. The courts have never presumed to lay down any arbitrary rule requiring some specific sort of evidence conclusive to the point, and excluding all other testimony. Whatever fact can give probable indication of the moral fact to be ascertained is relevant and must go to the jury, unless excluded by some general rule of evidence. Of its weight the jury are the judges. In every question of the fact of fraudulent intent, the intent is to be inferred from external facts or circumstances, and good faith may be established in the same way. What circumstances will amount to proof can never be matter of general definition. The legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury. Absolute metaphysical and demonstrative certainty is not essential to proof by circumstances. It is sufficient if they produce moral certainty to the exclusion of reasonable doubts.[1]

[1] Cole v. White, 26 Wend. 511; s. c. 24 Wend. 116.

In this case Senator Verplanck cites the following words of Kent, Ch. J.: "The distribution of power, by which the court and jury mutu-

REVIEW OF AUTHORITIES.—The question, having thus far been considered on principle, will now be examined in the light of the authorities.

The earliest case under the statute is Twyne's case.[1] This was a criminal prosecution in the Star Chamber, where the court was the judge of both the law and the facts, and, consequently, there is not that discrimination between law and fact which is found in trials at law. This case arose as follows: Pierce was indebted to Twyne in £400, and was indebted also to Chamberlin in £200. Chamberlin brought an action of debt against Pierce, and, pending the writ, Pierce being possessed of goods and chattels of the value of £300, in secret made a general

ally assist and check each other, seems to be the safest, and, consequently, the wisest. The constructions of the judges on the intention of the party may often be too speculative and refined, and not altogether just in their application to every case. Their rules may have too technical a cast, and become in operation too severe and oppressive. To judge accurately of motives and intentions does not require a master's skill in the science of the law. It depends more on the knowledge of the passions and of the springs of human action, and may be the lot of ordinary experience and sagacity." And then adds: "I can not forbear adding, that among the many eminent public services and titles to lasting legal and literary honors of this venerable and distinguished jurist, his uniform and zealous guardianship of the trial by jury, even to the last hour of his judicial life, is conspicuous and remarkable. Eminent above his cotemporaries for profound and extensive legal science, bringing to the consideration of every important point at once the black-letter lore of our ancient common law, and the varied range of its subsequent changes, together with the legal reason of the Roman code, down to the application of its doctrines by the great continental jurists of our own days—with all this rich store of scholarship and legal science, he, above all our judges, was the foremost to confess that there was still something that books can not teach—that the knowledge of the motives and springs of human action can be gained from everyday experience better than from judicial rules—and that such rules are constantly liable to become harsh, technical, severe and oppressive, without the correcting aid of the everyday experience of men and life found in the jury-box."

[1] 3 Co. 80; s. c. Moore, 638 (1602).

deed of gift of all his goods and chattels, real and personal, whatsoever, to Twyne in satisfaction of his debt. Notwithstanding this, Pierce continued in possession of the goods, and some of them he sold, and he sheared the sheep and marked them with his own mark. Afterwards Chamberlin obtained judgment against Pierce, and had a *fieri facias* directed to the sheriff of Southampton, who, by force of the writ, went to make execution of the goods, but divers persons, by the command of Twyne, resisted him, claiming them to be the goods of Twyne, by virtue of the deed. Whether this conveyance was fraudulent and of no effect was the question.

Among other "signs and marks of fraud," the court said, "The donor continued in possession and used the goods as his own, and by reason thereof he traded and trafficked with others, and defrauded and deceived them." The court also resolved that "No gift shall be deemed *bona fide* which is accompanied with any trust, as if a man be indebted to five several persons in the several sums of £20, and hath goods of the value of £20, and makes a gift of all his goods to one of them, in satisfaction of his debt, but there is a trust between them that the donee shall deal favorably with him in regard of his poor estate, either to permit the donor, or some other for him, or for his benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able—this shall not be called *bona fide*." Thereupon Coke gives the following advice: "Immediately after the gift take the possession of the goods, for continuance of possession in the donor is a sign of trust." These remarks show that the retention of possession was at that time simply regarded as a mark of fraud, similar in its character and effect to secrecy, the pendency of a suit, unusual

clauses, and the other signs of fraud enumerated by the court. The trust mentioned in the resolution was not simply a secret benefit, but a trust by which the title was held for the use of the debtor. Such a conveyance, by which the title is placed nominally in one person while it is beneficially in another, is unquestionably fraudulent, for it is merely colorable. Such trusts of chattels, when made in writing, are expressly made void by the statute of 3 H. VII, c. 4, and it was with reference to this that the court probably made the remark. It will also be noticed that Coke simply holds the retention of possession to be the sign of such a trust. Moreover, the possession retained in this case was not a mere naked possession, but a possession implying ownership and *jus disponendi*, with the knowledge and concurrence of the vendee. Pierce, the vendor, not only continued in possession of the goods, but he sold some of them. He sheared the sheep, and marked them with his own mark. There was, therefore, a possession with an implication of ownership, and *jus disponendi;* but that is a very different species of possession from mere naked possession.[1]

In Bucknal v. Roiston,[2] Brewer, a supercargo of a ship which was to go a voyage to the East Indies, having shipped on board several goods and commodities, borrowed of the plaintiffs £600, and gave a bottomry bond to pay £40 per cent. in case the ship should reign (as they called it) three years, and at the same time made a bill of sale to the plaintiff of the goods and commodities he had on board, and of the produce and advantage that should be made thereof; and this was in the nature of a security or pledge for the repayment of the £600 and £40

[1] Macdona v. Swiney, 8 Ir. Law (N. S.), 73. [2] Prec. Ch. 285 (1709).

per cent. premium. The ship went her voyage, and the goods were sold, and with the money others bought, and those likewise invested in other goods, and so there had been several barters and exchange of several sorts of goods. The ship, after three years, returned home, but it so happened that Brewer died upon the sea in his return home, and Roiston, who was a creditor of his by judgment for £1,500, obtained before the sale of those goods, got out letters of administration, and took possession of the goods and commodities returned home, and which belonged to Brewer. The plaintiffs thereupon brought their bill to have an account and discovery of the goods and satisfaction for the produce and advantage that was made thereof. Upon these facts the court said: "That the trust of these goods appeared upon the very face of the bill of sale; that though they were sold to the plaintiffs, yet they trusted Brewer to negotiate and sell them for their advantage, and Brewer's keeping possession of them was not to give a false credit to him, but for a particular purpose agreed upon at the time of sale; that here the plaintiffs are presently entitled to the trust of these goods, and to all the advantages consequential upon such trust, and may follow the goods for that purpose, and, therefore, decreed an account to be taken of the produce of those specific goods for the satisfaction of the plaintiff's claim."

It was in the course of the argument in this cause that Sir Edward Northey, the counsel for the defendant, said: "It has been ruled forty times in my experience, at Guildhall, that if a man sells goods and still continues in possession as visible owner of them, that such sale is fraudulent and void as to creditors, and that the law has been always so held." Of this remark, Savage, C. J.,[1] justly observes:

[1] Hall v. Tuttle, 8 Wend. 375.

"If it was intended to say that such continuance in possession was conclusive evidence of fraud and the fairness of the transaction might not be shown by evidence, I can only say that not one of the forty cases thus decided is to be found reported." It will also be noticed that in this case the bill of sale was held to be valid, although the vendor remained in possession of the goods.

In Stone v. Grubbam,[1] which was an action of ejectment, Robert Casey, who was possessed of a lease for years, made a gift of all his lands and chattels, including the lease, to Richard Saltingstone, but continued in possession after the transfer, and it was urged that for this reason the transfer was fraudulent. Coke, C. J., said, "If a man do mortgage his land, and yet still continue his possession, no disseizin is wrought by this, and so is Winnington's case; if it was an absolute conveyance and a continuance in possession afterwards, this shall be adjudged in law to be fraudulent, for this hath the face of fraud; but otherwise it is, as it is here in this case, where the conveyance was only conditionally, as upon payment of money—there the interest doth not pass absolutely, but upon a future condition, for the gift was before upon the condition of the payment of such a sum by Sir Richard Saltingstone. As to the fraud, *dolus versatur in universalibus*, but when the conveyance is conditional, continuance in possession after this shall not, in the judgment of the law, be said to be fraudulent, and this is very clear; and, as to the value of the lease, this is not at all material. As to the matter of fraud, the same ought to be fraud at the beginning, for that subsequent fraud will not make this conveyance to be fraudulent clearly; the whole court agreed herein. If a man hath any intention to evade out of the statute of Eliz.

[1] 2 Buls. 217; s. c. 1 Rol. Rep. 3 (1615).

c. 5, whatsoever he shall say afterwards shall not amend the matter, but the same shall be fraud and be within the statute, and that secrecy is a great badge of fraud, but yet no concluding proof; the whole court agreed herein. It was then demanded, (by reason of an objection made) in whose custody the lease was after the gift. It was answered, and so proved, that the same was always after (and until the assignment made to one Weston) in the custody of Sir Richard Saltingstone, to whom the gift was made. If the same had afterwards continued in the custody of Casey (who made the gift), then the same would have been clearly fraudulent; but, in regard that the contrary is here proved, it shall not be adjudged to be a fraudulent conveyance within the statute; the whole court agreed herein."

This case is obviously open to criticism. It is stated that a tenant for years, having made a lease at will, and the tenant at will having been ejected, brought the action for this ejectment of his lessee at will. But from the facts it appears that Casey originally owned the lease and transferred it to Saltingstone, and that Saltingstone subsequently assigned it to Weston. None of these persons, however, are parties to the suit. It is not, therefore, clear how the question of fraud arose in the case. In the next place, the question is not made to turn upon the possession of the land, but upon the possession of the lease. From the remarks in regard to secrecy, it would appear that the inquiry as to the custody of the title papers was made with reference to that point. It is, moreover, conceded, that the rule in regard to the retention of possession is not applicable to leases or other interests in land.[1] The report of this case in Rolle's

[1] Cadogan v. Kennett, Cowp. 432; Ryall v. Rolle, 1 Ves. 348; s. c. 1 Atk. 165; 1 Wils. 260; Worseley v. De Mattos, 1 Burr. 467; Phettiplace v. Sayles, 4 Mason, 312.

Reports is briefer, but gives what may be considered as the real point decided by the court. There the instruction to the jury is, that "if a man makes a gift, and the consideration is to be in the future, the continuance of the possession of the donor will not be fraudulent, unless it be expressly proved that it was made to defraud and to deceive creditors; as if a man mortgage lands to another upon a future condition, if the mortgagor continues in possession before the condition is broken, still he is not a disseizor, nor will it be fraudulent, for it is the custom in all such mortgages to suffer the mortgagor to continue in possession until condition broken, for he has the land for the security of his money, and before condition broken he is not to any detriment." It will also be observed that the transaction in this case was sustained.

The distinction between a mortgage and an absolute deed is also made in Lady Lambert's case.[1] There it is said that "If A., *bona fide* and for valuable consideration, mortgage his land whereof he hath a term of years to B., upon condition that if he repay the money to B. a year after that he shall re-enter, and B. doth covenant with A. that he shall take the profits of it until that time, &c., A. doth not pay the money, and B., hoping that he will pay it in time, doth suffer him to continue in possession and take the profit of it two or three years after, and in the interim judgment is had against A. upon a bond, and execution awarded; in this case, execution shall not be made of this lease, for this deed of mortgage shall not be said to be fraudulent as to the creditor, for when a conveyance is not fraudulent at the time of making of it, it shall never be said to be fraudulent for any matter *ex post facto*."

[1] Shep. Touch. 65.

In Meggot v. Mills,[1] it was proved that Wilson exercised the trade of a victualler, during which time Meggot furnished him with ale. Afterwards, he quit the trade of a victualler, and exercised the trade of an inn-keeper, and borrowed money of Mills (being Wilson's lessor) to buy goods to furnish his house, and for security of the money made a bill of sale of the goods to Mills, but kept the possession of them. After he became an inn-keeper, Meggot continued to sell him drink as before. He, however, paid Meggot several sums of money after he became an inn-keeper, amounting to as much as the debt was when he quit the trade of a victualler, but when he paid them did not express upon what account. He was subsequently declared a bankrupt, and Meggot was appointed his assignee. Meggot brought an action in trover against Mills for the goods. Holt, Ch. J., said: "If these goods of Wilson's had been assigned to any other creditor, the keeping of the possession of them had made the bill of sale fraudulent as to the other creditors. But since the original agreement was thus, and that honestly, and really made for securing the money of the defendant Mills, which he had lent to Wilson for this purpose, the agreement was good and honest."

In Cole v. Davies,[2] it was resolved by Holt, Ch. J., "that if goods of A. are seized upon a *fieri facias*, and sold to B. *bona fide*, upon valuable consideration, though B. permits A. to have the goods in his possession upon condition that A. shall pay to B. the money as he shall raise it by the sale of the goods, this will not make the execution fraudulent."

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[1] 1 Ld. Raym. 286; s. c. 12 Mod. 159 (1697).
[2] 1 Ld. Raym. 724 (1698).

The case of Ryall v. Rolle,[1] arose under the statute of 21 James I, c. 19, but the general doctrine of the retention of possession by the vendor was considered. Burnet, J., said: "The next consideration is, in what condition the creditors stood in their relation to conditional sales or mortgages by their debtors to their prejudice, where the mortgagor continued in possession of the goods mortgaged, and the statute governing this matter is 13 Eliz., in which there is no distinction between conditional and absolute sales, provided they are fraudulent. This statute being made to protect creditors against all conveyances to defraud them, it was incumbent on a court of equity, or a jury at common law, upon considering the whole circumstances, to pronounce whether the conveyance was made with such intent or not. Where the neglect naturally tended to deceive creditors, it has been held a badge of fraud where left in his hands. But if, by concurrent circumstances it appeared the title deeds were not left to defraud creditors, but upon reasonable and honest purposes, or left with the vendor not so as to deceive touching his substance, that, being accompanied with other circumstances, could not be pronounced a badge of fraud. Therefore, it lay open upon this to determine whether fraudulent or not. The leading case on this is Twyne's case, where it is held that it was upon a valuable consideration, but not *bona fide*, from the continuing in possession and trading therewith. It is difficult, unless in very special cases, to assign a reason why an absolute or conditional vendee of goods should leave them with the vendor unless to procure a collusive credit, and it is the same whether in absolute or conditional sales, neither the statute nor the reason of the thing making any differ-

[1] 1 Ves. 348; s. c. 1 Atk. 165 (1749); 1 Wils. 260.

ence. But it is insisted there are several cases where there is a distinction as to this possession after sale between conditional and absolute conveyances of land or goods. That of lands is not applicable to a case of goods. The case cited for this was Stone v. Grubbam, 2 Buls. 226, and 1 Rol. Rep. 3, but no argument from thence, unless the possession of land and goods after a conveyance was on the same footing. Possession is not otherwise a badge of fraud unless as calculated to deceive creditors. There is no way of coming at the knowledge of who is owner of goods but by seeing in whose possession they are; the possession of land is of a different nature—there may be a possession as tenant at will, as every mortgagor is of a mortgage before the condition is broken. Every one desiring credit entitles to an inquiry into his substance, and, therefore, because the possession of land is of an ambiguous nature, as it may be in the hands of the tenant as well as the owner, the title deeds, &c., may be required, but never at what market goods were bought, the possession and usure of them being all. Lord Chief Justice Holt takes up the case of Meggot v. Mills upon the fraud, and gives it as his opinion that it was not fraudulent, and it is very clear that it was not the distinction betwixt a conditional and absolute sale which weighed with him at all. He distinguishes betwixt a bill of sale to a landlord and to any other creditor, so that it was his opinion that it was not fraudulent in case of a landlord. But, though from all these cases it does appear that in the construction of the 13 Eliz. there is no distinction between conditional and absolute sales of goods, if made with intent to defraud creditors, yet a court of equity or a jury are left at large to construe whether it was made with such intent or not." These remarks admit of but one construction—the retention of possession is not re-

garded as decisive, but the question of fraud is to be left to the jury to determine from all the circumstances of the case.

The case of Worseley v. De Mattos[1] arose under the statute of 21 Jac. c. 19, but the doctrine of possession was discussed. Lord Mansfield, in delivering the opinion of the court, said: "Every equivocal fact may be explained by circumstances. Hardly any deed is fraudulent upon the mere face of it. It is a good sale if the consideration be true; fraudulent if false; good if possession immediately follows; bad if it do not; nay, the not taking possession, being only evidence of fraud, may be explained."

Martin v. Podger *et al.*[2] was an action for trespass. Verdict was given in favor of the plaintiff, and the question arose upon a motion for a new trial. William Martin, being the owner of the goods in controversy, made a bill of sale of them to the plaintiff, who was his father, but remained in possession. The defendants seized the goods in the execution of a writ against the son. Lord Mansfield said: "As the goods were in the possession of the son, I think the judge should have left it to the jury whether, under these circumstances, the father had any right to recover. Therefore, I incline that a new trial should be granted." A rule was accordingly entered for a new trial, unless cause to the contrary were shown. Afterwards, upon an attempt to show cause, the court, finding the "circumstances of the bill of sale to have been extremely suspicious, were unanimous that the judge ought to have left it to the jury upon the ground of fraud."

From the report of this case in Burrows' Reports, it appears that the bill of sale was considered fraudulent in

[1] 1 Burr. 467 (1753). [2] 2 W. Bl. 701; s. c. 5 Burr. 2631 (1770).

fact. It is there stated that, for want of proof of the judgment, a verdict was found for the plaintiff, subject to the opinion of the court upon the question whether it was necessary for the defendants to produce a copy of the judgment upon which the writ of *fieri facias* issued. The court decided that it was necessary to produce a copy of the judgment. "But the whole court were likewise of opinion that this recovery in this action, brought by the father upon a fraudulent bill of sale, merely colorable, not a real, fair transaction, but leaving the possession in the son, and fraudulent even at common law, independent of the statute of 13 Eliz. c. 5, § 2, was shameful, unreasonable, and against justice, and that the verdict ought not to stand. It might have been left to the jury whether the plaintiff was in possession of the goods or not. It was a matter fit to be left to a jury. But it is a shameful thing to set up this fraudulent, colorable bill of sale as a real conveyance of the property." Upon the motion for a new trial, Lord Mansfield said: "The verdict arises from a slip and inadvertence; it is against law and justice. The plaintiff has no merits. The bill of sale was fraudulent; the son remained in possession. The recovery is manifestly contrary to reason and justice."

Cadogan v. Kennett[1] was an action of trover, brought by the plaintiffs, who were trustees under the marriage settlement of Lord Montfort, against Kennett, who was a judgment creditor of Lord Montfort's, and the other defendants who were sheriff's officers, to recover certain goods taken by them in execution under a *fi. fa.* At the trial the marriage settlement was proved, by which it appeared that the goods in question, which were the household goods belonging to Lord Montfort, at his lordship's

[1] 2 Cowp. 432 (1776).

house in town, were conveyed to plaintiffs, as trustees, for the use of Lord Montfort for life, remainder to Lady Montfort for life, remainder to the first and other sons of the marriage in strict settlement. At the time of making the settlement it was known that Lord Montfort was in debt, but he thought the fortune of the lady he was to marry was amply sufficient to pay all the debts he owed at that time, and had no idea of disappointing any creditor. Kennett was a creditor of Lord Montfort's at the time of the settlement. At the trial Lord Mansfield thought the possession of Lord Montfort was not fraudulent, because it was in pursuance and in execution of the trust, and the jury found a verdict for the plaintiffs. Upon a motion for a new trial, Lord Mansfield said: "Such a construction is not to be made in support of creditors as will make third persons sufferers. Therefore the statute does not militate against any transaction *bona fide*, and where there is no imagination of fraud, and so is the common law. But if the transaction be not *bona fide*, the circumstances of its being done for a valuable consideration will not alone take it out of the statute. I have known several cases where persons have given a fair and full price for goods, and where the possession was actually changed, yet being done for the purpose of defeating creditors, the transaction has been held fraudulent, and therefore void. There are many things which are considered as circumstances of fraud. The statute says not a word about possession. But the law says, if after a sale of goods the vendor continue in possession, and appear as the visible owner, it is evidence of fraud, because goods pass by delivery, but it is not so in the case of a lease, for that does not pass by delivery. The question, therefore, in every case is whether the act done is a *bona fide* transaction, or whether it is a trick and con-

trivance to defeat creditors. An argument, however, is drawn from the possession as a strong circumstance of fraud; but it does not hold in this case. It is a part of the trust that the goods shall continue in the house."

From this review of the authorities it will be seen that down to the time of Edwards v. Harben, there was not a single case in which a transaction was held to be fraudulent on the ground of possession alone, and that the *obiter dicta* of Coke, in Stone v. Grubbam, and of Holt, in Meggot v. Mills, and the remarks of Sir Edward Northey, in Bucknal v. Roiston, are all that can be found to support the doctrine that the retention of possession is conclusive evidence of fraud.

Edwards v. Harben[1] was an action of assumpsit for goods sold to the defendant's testator. It was proved that Mercer in his lifetime was indebted to the plaintiff in the sum of £22 18*s*. 6*d*. for goods sold and delivered, and to the defendant in the sum of £191 for money lent. Mercer offered to the defendant a bill of sale of his goods, household furniture, and stock in trade in his house at Lewes, by way of security for the debt. The defendant refused to accept the same, unless he should be at liberty to enter upon the effects and sell them immediately after the expiration of fourteen days from the execution thereof, in case the money should not be sooner paid, to which Mercer agreed, and accordingly executed a bill of sale. All the effects described in the bill of sale remained in the possession of Mercer until the time of his death. After the death of Mercer, and before the expiration of fourteen days from the execution of the bill of sale, the defendant entered the house of the deceased, and took possession of the effects contained in the bill of sale and afterwards sold them.

[1] 2 T. R. 587 (1788).

The plaintiff sued him as executor *de son tort.* At the trial a verdict was found for the plaintiff, subject to the opinion of the court upon these facts. Buller, J., in delivering the opinion of the court, said: "On this case the question arises whether the bill of sale be void or not. This question came before the court in the last term, in the case of Bamford v. Baron, on a motion for a new trial from the Northern circuit, and after hearing that case argued, we thought it right to take the opinion of all the judges upon it. Accordingly we consulted with all the judges, who are unanimously of opinion that unless possession accompanies and follows the deed, it is fraudulent and void. I lay stress upon the words 'accompanies and follows,' because I shall mention some cases where, though possession was not delivered at the time, the conveyance was not held to be fraudulent. There are many cases upon this subject from which it appears to me that the principle which I have stated never admitted of any serious doubt; so long ago as in the case in Bulstrode, the court held that an absolute conveyance, or gift of a lease for years, unattended with possession, was fraudulent, but if the deed is conditional, there the vendor's continuing in possession does not avoid it, because by the terms of the conveyance, the vendee is not to have the possession till he has performed the condition. Now here the bill of sale was on the face of it absolute, and to take place immediately and the possession was not delivered, and that case makes the distinction between deeds or bills of sale which are to take place immediately and those which are to take place at some future time. For, in the latter case the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed, and such possession comes within the rule as accompanying

and following the deed. That case has been universally followed by all the cases since. The Chancellor, in the case of Bucknal v. Roiston, proceeded on the distinction which I have taken; he supported the deed because the want of possession was consistent with it. This has been argued by the defendant's counsel as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se* as makes the transaction fraudulent in point of law; that is the point which we have considered, and we are all of opinion that if there be nothing but the absolute conveyance, that, in point of law, is fraudulent. On the other hand, there are cases where the vendor has continued in possession and the bill of sale has not been adjudged fraudulent if the want of immediate possession be consistent with the deed."

It is important to see upon what grounds the counsel, who impugned the validity of the bill of sale in this case, based his argument. He says: "This bill of sale is void, under 13 Eliz. c. 5, because it was not attended with any mark of possession, notorious to the rest of the world, but the vendor, by agreement with the vendee, which constitutes a part of the original transaction, continued in the possession and disposition of the goods mentioned in the bill of sale until his death. In considering this question, the two following principles may be supported: 1st. Whenever the vendor is found in the actual possession of goods which he has sold, such continuance in possession is *prima facie* evidence of an intent to delay, hinder or defraud creditors, and throws it on the other party to rebut it by showing that the continuance in possession was with some other view. 2d. Whenever there is a positive agreement between the parties that the vendor shall be permitted, after the sale, to have for any space of time, not only the

mere manual occupation, but also the disposition of the goods sold, to trade with them as his own, it is an actual fraud on the other creditors of the vendor. As to the first, every man is supposed to intend the natural and probable consequences of his own acts, unless it can be shown from circumstances that he acted upon some other motives. Now, in a case like the present, the natural and probable consequence of suffering another to continue in the possession of property not his own, is to hinder, delay and defraud creditors of their just debts by giving him a false credit. Visible possession is the only criterion of personal property. Secondly, the bill of sale delivered under the circumstances of this case is an actual fraud upon the vendor's creditors. For here the false credit is not only the natural and probable, but the unavoidable, consequence of the deliberate act of the parties—an act incapable of explanation from any other motive than that of imposing on creditors—it is a stipulation from which neither party can draw a fair advantage. Either the vendor must be considered in the intermediate time as a trustee for the vendee, or that he is empowered to trade with the vendee's property for his own benefit. If the former, he receives no personal benefit from the stipulation; if the latter, it necessarily implies that the sale was not real, or that the consideration was not adequate; otherwise the vendee would not risk his property and give up part of his purchase for nothing. Apparent personal property is the principal foundation of general credit. It is material, therefore, when a person is reduced to part with this kind of property, especially such as is considered either as objects of personal accommodation, or as instruments of trade, that his creditors should be aware of his situation."

From these remarks it will be seen that possession alone was simply considered *prima facie* evidence of fraud. But the possession in this case was a possession implying ownership and *jus disponendi*. There was an actual, positive agreement that the vendor was not only to keep possession of the goods, but to deal with them as his own. It was the case of a trader who was daily selling goods, and whose business it was to sell, and the bill of sale covered his stock in trade.[1] The other cases in England, where the transaction has been considered fraudulent on account of the retention of possession, are of the same character. In Paget v. Perchard[2] the vendor kept a public house. The bill of sale was of all his effects, including all the liquors in the house as well as the furniture. After the execution of the bill of sale the vendor sold liquors in the usual way of his trade, received the money, and did not account for it. Lord Kenyon held that, allowing the vendor to execute acts of ownership after parting with all his property by the bill of sale, was sufficient evidence of fraud. In Wordall v. Smith[3] the vendor made a bill of sale of all his effects, consisting of his household furniture and his stock in trade as a publican, but continued to carry on the business as usual for several weeks. The money received for sales was placed in a till to which he had access. Ryall v. Rolle[4] and Worsely v. De Mattos were also cases where traders mortgaged their stock in trade, and after the execution of the mortgages continued to carry on their trade and sell the property for their own benefit.[5]

[1] Macdona v. Swiney, 8 Ir. Law (N. S.) 73.

[2] 1 Esp. 205 (1795).

[3] 1 Campb. 332 (1808).

[4] 1 Ves. 348; 1 Atk. 165; 1 Wils. 260.

[5] The only exception to these remarks is Bamford v. Baron, 2 T. R. 594, note. That was an assignment for the benefit of creditors, and the debtor was permitted to carry on the trade for a certain period, and

On the other hand, in none of the cases where the transaction has been sustained, notwithstanding the retention of possession, was the vendor allowed to sell the goods for his own benefit.[1]

As the other cases in England simply constituted exceptions to the doctrine laid down in Edwards v. Harben, until it was finally settled that the retention of possession was only presumptive evidence of fraud, it is not necessary, in this connection, to trace them any further. For the purpose of understanding the course of the decisions upon this subject, it should be borne in mind that the rule laid down by the court in that case was that

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account to the trustee for all the profits of the trade from the date of the assignment. If this case should be considered good law in England now, it would be placed on a different ground. Reed v. Blades, 5 Taunt. 212, supports the distinction stated in the text. Doubts as to what was really decided in Edwards v. Harben are raised by the remarks of Buller, J., in Buller's N. P. 258, and Hazelinton v. Gill, 3 T. R. 620, note; 3 Doug. 415; Weaver v. Joule, 91 E. C. L. 309; s. c. 3 C. B. (N.S.) 309.

In Edwards v. Harben, the ground chiefly relied on in argument is, that by allowing the vendor to retain possession after the sale as apparent owner, the vendee enables him to obtain a false credit. This would only apply to subsequent creditors who trusted him on the faith of the property. It would not do to say that this of itself constitutes fraud, for then every one who lends or hires property to another, a merchant who furnishes a shopkeeper with goods on credit, and thus enables him to hold himself out as owner and thus obtain credit, would be guilty of the same sort of fraud. Then it was argued, with respect to antecedent creditors, that it tends to delay and hinder them—that relying on the appearance of property in the debtor, they are prevented from taking proper means to enforce their demands. But in that case the debtor conveyed the whole of his property, and whether immediate possession had been taken by the vendee or not, antecedent creditors would have been equally defeated. In such cases, then, it cannot be the failure to take possession by the vendee which operates the fraud on such creditors. (Smith v. Henry, 1 Hill, 16; 2 Bailey, 118.)

[1] Eastwood v. Brown, Ry. & Mood. 312; Hoffman v. Pitt, 5 Esp. 22; Eveleigh v. Purrsford, 2 Mood. & Rob. 539. The only exception is Benton v. Thornhill, 2 Marsh. 427; s. c. 7 Taunt. 149.

the possession must be consistent with the deed. As this principle was addressed merely to the form of the transaction, it was readily complied with by the insertion of a stipulation providing that the vendor might retain possession, and several deeds have been held valid simply on the ground of the presence of such a clause.[1] A rule that could be thus easily evaded was of course practically worthless, and a modification was found to be necessary.

In Vredenbergh v. White,[2] Barrow v. Paxton[3] and Beals v. Guernsey,[4] it was held that possession was only *prima facie* evidence of fraud, and open to explanation. In Sturtevant v. Ballard,[5] the bill of sale contained a stipulation that the vendor should have the use and occupation of the articles for three months. Kent, Ch. J., said: "The question arising upon this case is whether the sale is valid in law as against the judgment creditor. The great point is whether the fact of permitting the vendor to retain possession of the goods did not render this sale fraudulent in law, notwithstanding such permission was inserted in the deed as a condition of the contract. If there had been no such insertion, but the sale had been absolute on the face of it, and possession had not immediately accompanied and followed the sale, it would have been fraudulent as against creditors, and the fraud in such case would have been an inference or conclusion of law which the court would have been bound to pronounce. But it by no means follows that such a sale, with such an agreement attached to it and appearing on the face of the

[1] Wooderman v. Baldock, 8 Taunt. 676; Martindale v. Booth, 3 B. & A. 498.

[2] 1 Johns. Cas. 156 (1799).

[3] 5 Johns. 258 (1810).

[4] 8 Johns. 446 (1811).

[5] 9 Johns. 337 (1812).

deed, is necessarily valid. There must be some sufficient motive, and of which the court is to judge, for the non-delivery of the goods, or the law will still presume the sale to have been made with a view to 'delay, hinder or defraud creditors.' Delivery of possession is so much of the essence of the sale of chattels that an agreement to permit the vendor to keep possession is an exception to the usual course of dealing, and requires a satisfactory explanation. We may therefore safely conclude that a voluntary sale of chattels, with an agreement either in or out of the deed that the vendor may keep possession, is, except in special cases to be shown to and approved by the court, fraudulent and void as against creditors. This is clearly not one of those cases." Hamilton v. Russell[1] preceded this case in point of time, but this case is the leading one in America[2] upon this subject.

In Wickham v. Miller,[3] Gates, J., held that the non-delivery of the goods is no more than *prima facie* evidence, and might be explained by circumstances, but the decision did not rest upon that point. In Butts v. Swartout,[4] the plaintiff made a contract with the vendor, who was a cabinet-maker, for a bureau. When nearly completed, it was formally delivered, but left with the vendor to be trimmed. The proof also showed that the vendor had other goods which he offered to the defendant, who was a constable, to satisfy the execution in his hands. Sutherland, J., said: "The question of fraud depends upon the motive. The non-delivery of the bureau is only

[1] 1 Cranch. 309.

[2] Clow v. Woods, 5 S. & R. 275; Coburn v. Pickering, 3 N. H. 415; Patten v. Smith, 5 Conn. 196; s. c. 4 Conn. 450; Gibson v. Love, 4 Fla. 217; Hundley v. Webb, 3 J. J. Marsh. 643; Planters' Bank v. Borland, 5 Ala. 531.

[3] 12 Johns. 320 (1815).

[4] 2 Cow. 431 (1823).

one circumstance in proof of fraud, and it is accounted for."

The question arose again in Bissell v. Hopkins,[1] and Savage, Ch. J., said: "The question in every case is, whether the act done is a *bona fide* transaction, or whether it is a trick and contrivance to defeat creditors. The possession by the vendor of personal chattels after the sale is not conclusive evidence of fraud. The vendee may, notwithstanding, upon proof that the sale was *bona fide* and for a valuable consideration, and that the possession of the vendor after such sale was in pursuance of some agreement not inconsistent with honesty in the transaction, hold under his purchase against creditors. A good reason is given, in my judgment, why the vendor was not at once stripped of his property, as thereby his power of acquiring the means to pay his debts would have been taken from him."

After this decision there were six decisions in New York holding possession to be only presumptive evidence of fraud, and one declaring that the explanation must be satisfactory to the court. Strict logic required that Bissell v. Hopkins should be considered as overruling Sturtevant v. Ballard. But the genius of the law demands that conflicting cases shall be reconciled wherever reconciliation is possible. Accordingly, in Divver v. McLaughlin,[2] Savage, Ch. J., held that "The possession of personal property by the vendor or mortgagor inconsistent with the face of the deed is *prima facie* evidence of fraud, but subject to explanation. In other words, such possession is, except in special cases and for special reasons to be shown to and approved of by the court, fraudulent and void as against

[1] 3 Cow. 166 (1824). [2] 2 Wend. 596 (1829).

creditors. The mortgage in this case, after forfeiture without explanation, must be held fraudulent and void as against creditors. The only real question, therefore, is whether the reasons shown why the possession was not changed are such as can be approved of by the court under the special circumstances. The counsel for the defendant in error contends that this is a question for the jury. Upon a conceded state of facts, fraud is a question of law. There is in this case no dispute about the facts; it is a question for the court, therefore, to decide whether the mortgage was valid or void as against creditors."

The same principle was asserted in Jennings v. Carter[1] and in Archer v. Hubbell.[2]

This was the condition of the question at the time of the adoption of the revised code.[3] In the revision of the statute law it was attempted to settle all doubts and discrepancies by positive legislation and strict definition. Accordingly, the revisers recommended that "all sales or mortgages not accompanied by an immediate delivery, and followed by an actual and continued change of possession, should be void against the creditors of the vendor," and this without any exception and excluding all explanation. But the same considerations of natural equity which had so often induced courts to break in upon the judicial rule of legal policy, had again equal weight with the legislature, so that, in adopting the section recommended by the revisers, they added a clause of exception, enabling the person claiming under the sale or assignment to rebut the legal presumption of fraudulent intention by positive evidence of the good faith of the transaction. It was accordingly enacted, first, nearly in the strong and

[1] 2 Wend. 446 (1829). [2] 4 Wend. 514 (1830). [3] 1830.

comprehensive language of the revisers, that every sale of goods and chattels and every assignment by way of mortgage or security, "unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, shall be pronounced to be fraudulent and void as against creditors or subsequent purchasers, and shall be conclusive evidence of fraud"; then the legislature, of its own motion, added the excepting and qualifying clause, "unless it shall be made to appear on the part of the person claiming under such sale or assignment that the same was made in good faith and without any intent to defraud such creditors or purchasers." This question of fraudulent intent a subsequent section enacted should be a question of fact and not of law.[1] These enactments were thought to have settled the law conclusively, but they merely afforded a new and remarkable proof of the imperfection of human language and the impossibility of definitely settling any great rule of law for the complicated affairs of human life merely by the general language of a statute or the provisions of a code.[2]

Hall v. Tuttle[3] arose before the adoption of the Revised Statutes, but was decided afterwards, and the court held that they were simply declaratory of what was understood to have been the law ever since the 13th Eliz. ch. 5, and what the common law was before that statute was enacted. But in Collins v. Brush,[4] the court said:

[1] Rev. Stat. 136, § 5.

[2] Stoddard v. Butler, 20 Wend. 507; 7 Paige, 163; Smith v. Acker, 23 Wend. 653, per Senator Verplanck. The ground of all the errors of the decisions upon this subject would seem to be the desire of the court to establish a code of morals, which shall put it out of the power of persons to commit fraud, rather than to carry out the intention of the legislature to provide means of detecting fraud when committed. (Smith v. Acker, 23 Wend. 653, per Senator Hopkins.)

[3] 8 Wend. 375 (1832).

[4] 9 Wend. 198 (1832).

"It is incumbent upon the vendee to repel the presumption of fraud by showing some satisfactory reason for his omission to take the property into his possession. It is not sufficient to show a valuable consideration; some reason must be shown which the court can approve for leaving the goods in the possession of the vendor." The same doctrine was held in other cases.[1] It was also held that the distinction between conditional and absolute sales was abolished,[2] and that the mere accommodation of the parties was not a satisfactory explanation, so that the only effect of the enactments seemed to be to make the rule more rigorous.

The question arose again in Stoddard v. Butler.[3] Butler, who was a creditor of Stoddard, instituted suit and obtained judgment; but between the commencement of the suit and the recovery of the judgment, Stoddard executed an absolute assignment of his stock of goods and of certain notes and accounts to Thurber & Townsend, for and towards the payment and satisfaction of a debt due to them. The goods and notes and accounts were left in the possession of Stoddard, who was authorized, as the agent of the vendees, to sell the goods and collect the notes and accounts, and they agreed to give him a fair compensation for his services. The complainants filed a bill in equity to set aside the conveyance as fraudulent. The vice-chancellor dismissed the bill. The complainants appealed to the chancellor, who reversed the decree of the vice-chancellor, and adjudged the assignment to be fraudulent.

[1] Gardner v. Adams, 12 Wend. 297 (1834); Doane v. Eddy, 16 Wend. 523 (1837); Randall v. Cook, 17 Wend. 53 (1837); Stevens v. Fisher, 19 Wend. 181 (1838); Beekman v. Bond, 19 Wend. 444 (1838).

[2] Gardner v. Adams, 12 Wend. 297; Doane v. Eddy, 16 Wend. 523; Randall v. Cook, 17 Wend. 53.

[3] 20 Wend. 507; s. c. 7 Paige, 163 (1838).

From this decree the respondents appealed to the Court of Errors, and thus for the first time was the question raised in that court, the other decisions having been rendered in the Supreme Court. The decree of the chancellor was affirmed by a divided court: twelve for affirmance and twelve for reversal. Two questions were raised: first, whether possession alone rendered the transfer void, and secondly, whether the property was disproportioned in value to the amount of the debt intended to be satisfied, thus making the assignment fraudulent in fact; and upon both the court was divided, but three members of the court—the President and Senators Tallmadge and Edwards, who voted for affirmance—subsequently adopted the opinion that the weight of the evidence to repel the presumption was for the determination of the jury, and two stated that their votes in this case were given upon the ground of fraud in fact.[1] The important features of the case, however, were the opinions of Senator Dickinson and Senator Verplanck. That of Senator Dickinson has been styled the ablest argument ever delivered upon the subject, but his attempt to reconcile all the conflicting decisions shows the condition of the question at that time. The decision of the court left the matter as unsettled as ever, except that an impression prevailed that if a case should be brought before it free from other questions, the doctrine of the Supreme Court would be overruled.

The question came before it again in Smith v. Acker,[2] and was the only point in the case. Bell made a mortgage to Smith & Hoe, and remained in possession. The sheriff seized the property on an execution against Bell. Smith & Hoe brought an action of replevin. The defendant moved for a nonsuit. The plaintiff insisted that the

[1] Smith v. Acker, 23 Wend. 653.

[2] 23 Wend. 653 (1840).

question of fraudulent intent should be submitted as a question of fact to the jury. This the judge refused to do, and ordered a nonsuit, and the judgment was subsequently affirmed by the Supreme Court. The plaintiffs thereupon sued out a writ of error, and removed the case into the Court of Errors. The judgment was there reversed, on the ground that the judge erred in assuming to decide upon the matters of fact, which belonged to the jury.

The question now took another aspect. Possession was on all sides admitted to raise a presumption of fraud, and the only point in dispute was in regard to the mode of rebutting it, one party holding that the explanation must be satisfactory to the court, and the other party that the whole matter must be left to the jury. In Stevens v. Fisher,[1] Cowan, J., had endeavored to support the former by placing the doctrine upon the right of the court to reject incompetent and irrelevant testimony. This proposition was argued more at length in White v. Cole.[2] He said: "The *quo animo* is a question of fact for the jury when an explanation is offered; that is, as I understand the phrase, not any and everything which may be called an explanation, but evidence pertinent to the question of fact. It stands on the footing of any other question of fact to be determined by the jury. If the testimony offered be pertinent in the opinion of the judge, it is his duty to receive it; if not, he is bound to reject it. This is a universal rule in relation to trying all questions of fact, which separates the province of the judge from the jury. The question arises upon the competency of the evidence, not the sufficiency. The statute gives the court no power to determine what particular facts shall or shall not be sufficient evidence of honest intention. The

[1] 19 Wend. 181.

[2] 24 Wend. 116 (1840).

statute says nothing one way or the other as to what facts shall persuade or what shall be pertinent. For all this the judge is left to the common law. The whole, then, comes down to the question of what testimony is admissible. The principle has, therefore, obtained an almost universal footing, that the mere proof of a debt, to whatever amount, shall not be allowed to excuse the continuance of possession; and that it cannot be so regarded by a jury, however necessary the use of the property may be for the debtor. These two circumstances prove nothing of themselves. They do not make an explanation, nor can the jury regard them as sufficient to overturn the presumption of fraud derivable from the possession of the debtor. They are not pertinent evidence"

The case was carried up for review to the Court of Errors,[1] and this new position was fairly met and overruled. It was held that all facts or circumstances which to the common understanding and conscience of men may prove, or on their face may tend to prove, good faith, are within the rightful privilege of the jury to hear and weigh; and the judgment was reversed because relevant testimony on a question of the fact of fraudulent intent was excluded from the consideration of the jury, whose right it was to pass upon its weight and sufficiency.

The controversy, however, was not yet terminated. Up to this time it had been carried on in a spirit of candid discussion, but now it took a partially personal tone. In Randall v. Cook, Bronson, J., observed: "Had it been declared fifty years ago that if a man conveyed his personal chattels and still kept them himself, under

[1] Cole v. White, 26 Wend. 511; s. c. 24 Wend. 116 (1841).

any pretence whatever, the transaction should be deemed absolutely fraudulent and void as against creditors, it would have saved an incalculable amount of time and money which has been expended in the litigation of questions of this kind, and it would, moreover, have rendered a most important service in the cause of good morals by removing all temptations to the numberless frauds which have been committed for the purpose of placing property beyond the reach of legal process." Commenting upon these remarks, Senator Dickinson[1] said: "If, at the same time, the law had laid its interdiction upon all human intercourse as to exchanges or purchases of property, the same result would have been produced, and with about equal justice and propriety." Senator Hopkins also said:[2] "The same reasoning would be applicable to almost all the business transactions of life. If everything capable of being perverted in the hands of the dishonest to fraudulent purposes is to be done away, the honest portions of the community will have little left of all they deem most valuable. The reasoning would be equally applicable to all sales upon credit. Had all credits been prohibited fifty years ago it would no doubt have saved an incalculable amount of time and money."

In Butler v. Van Wyck,[3] Bronson, J., delivered a dissenting opinion, and, observing that his remarks had been made the text for spirited and witty commentary, and styling the opinion of Senator Hopkins the prevailing opinion, held that the decision of the Court of Errors should be disregarded.

In Hanford v. Artcher,[4] the Court of Errors, adhering to its previous decisions, felt called upon to notice and

[1] Stoddard v. Butler, 29 Wend. 507; s. c. 7 Paige, 163.
[2] Smith v. Acker, 23 Wend. 653.
[3] 1 Hill, 438.
[4] 4 Hill, 271; s. c. 1 Hill, 347 (1842).

comment upon this opinion and vindicate its course. In this case there was still another point. The question was submitted to the jury, but the judge instructed them that it was for them to decide whether there was any good reason shown, which they could approve, why there had not been an immediate delivery and an actual and continued change of possession. The Court of Errors, considering that the instruction restricted them to the consideration of good reasons to excuse a want of delivery and prevented them from considering the whole *bona fides* of the case, reversed the judgment. President Bradish said: "Instead of directing them to the only inquiry expressly prescribed by the statute, the judge led their minds to one not in terms embraced in its provisions and calculated to present to them a false issue. This was error. Instead of the inquiry thus directed, he should have charged the jury to inquire whether it had been made to appear on the part of the vendee that the sale was made in good faith and without any intention to defraud creditors. This would have been in the language and spirit of the statute. But the direction gave an artificial, restricted and erroneous interpretation to the statute." It will thus be seen that the difference between the Court of Errors and the Supreme Court was in regard to what the question was to be tried and who should try it. The latter insisted that the issue was whether there was any satisfactory explanation and that the court should try it. The former said that the issue was a question of intent and that the jury should try it.

It would seem as though the questions were clearly and unmistakably settled, but it was subsequently asserted in Randall v. Parker[1] that all the cases upon this subject

[1] 3 Sandf. 69.

were reconcilable. This attempt at a reaction, however, was only temporary, and the point is now considered as finally and conclusively determined.[1] Thus terminated one of the most remarkable controversies in the whole annals of jurisprudence, a controversy extending over a period of more than two centuries, and engaging the attention of the most eminent jurists of the times.

As this question may be considered to have turned partly upon the peculiar statute of New York, it may be well to glance briefly at the course of the decisions in one other State. The doctrine that possession is conclusive evidence of fraud was held for a long time in Virginia.[2] In Land v. Jeffries,[3] Cabell, J., said: "The question does not by any means involve any doubt as to the effect of the mere circumstance of actual possession not passing from the grantor contemporaneously with the execution of the conveyance, nor as to the effect of the mere circumstance of such possession being found in his hands afterwards. Nobody ever pretended that either of these was such a circumstance *per se* as makes the transaction fraudulent in law. Everybody admits that the mere possession of personal property after an absolute conveyance is only evidence of fraud to be submitted to the jury, and that it is only *prima facie* evidence. Being only *prima facie* evidence of fraud, it must, from its very nature, be liable to be rebutted by

[1] Thompson v. Blanchard, 4 N. Y. 303; Miller v. Lockwood, 32 N. Y. 293; Van Buskirk v. Warren, 39 N. Y. 119; 34 Barb. 457; 13 Abb. Pr. 145; 4 Abb. Ap. 457.

[2] Alexander v. Deneale, 2 Munf. 341; Williamson v. Farley, Gilmer, 15; Robertson v. Ewell, 3 Munf. 1; Glasscock v. Batton, 6 Rand. 78; Lewis v. Adams, 6 Leigh, 320; Mason v. Bond, 9 Leigh, 181; Tavenner v. Robinson, 2 Rob. 280.

[3] 5 Rand. 211; S. C. 599.

other testimony, and, consequently, the possession of the vendor is susceptible of explanation as to its character, for the purpose of freeing it from the imputation of fraud."

"Many cases might be stated as examples for showing the operation of this principle, but a single one will suffice. A man purchases the chattel of another for full consideration and *bona fide*. The chattel at the time of the sale is on the farm of the vendor. It is the expectation and intention of both parties that it shall be removed with all reasonable dispatch, and it remains, in the meantime, in the possession of the vendor, without any regard to his convenience, but solely to await the reasonable convenience of the vendee in removing it. But before the vendee can thus remove it an execution comes out against the goods and chattels of the vendor, and the sheriff, finding the chattel in his possession, levies the execution upon it and sells it. In an action of trespass brought by the vendee against the sheriff, if the vendee exhibits nothing but his absolute bill of sale, the sheriff may show that notwithstanding the bill of sale the chattel was found by him in the vendor's possession. Now, as the possession of personal chattels is *prima facie* evidence of property in or of trust for the person possessing, the possession of the vendor thus exhibited would be *prima facie* inconsistent with the avowed object of the absolute conveyance to the vendee, and would, therefore, be *prima facie* evidence of a trust for the vendor, and that the absolute conveyance was intended as a cover to disguise and conceal that trust, and thereby to delay, hinder and defraud creditors. But still, this would be *prima facie* evidence only, liable to be rebutted by other testimony."

"If, therefore, the vendee shall prove that the possession of the vendor was connected with no motive of benefit or advantage to the vendor, but was for the reasonable convenience of the vendee only, and was intended to continue no longer than such reasonable convenience required, all presumption of property in the vendor or of trust for him is done away, and consequently the possession of the vendor is shown not to be inconsistent with the purpose of the absolute deed, and thus the whole foundation for the inference of fraud would be removed. But suppose that the sheriff should not only prove that the chattel was found in the actual possession of the vendor, but that it was agreed between the vendor and vendee at the time of the conveyance that the chattel should remain in the possession of the vendor for a long or a short time, to be used by him during that time as if he were the owner. Such a possession by the vendor would be manifestly inconsistent with the deed, for the deed purports to be for the sole and exclusive benefit of the vendee, whereas the possession as explained by the agreement shows a trust for the benefit of the vendor."

The doctrine was still further relaxed in the cases of Sydnor v. Gee[1] and Lewis v. Adams.[2] The confidence of the profession in the former decisions was thus shaken, and doubts and uncertainty were produced. It was therefore deemed best that the whole subject should be reviewed, and the law finally settled so as to preclude future controversy. In Davis v. Turner[3] it was determined that possession simply raised a presumption of fraud, and that the weight and sufficiency of the evidence to rebut it was for the consideration of the jury.

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[1] 4 Leigh, 535. [2] 6 Leigh, 320. [3] 4 Gratt. 422 (1848).

THE AUTHORITIES.—The preponderance of the authorities is, at the present time, in favor of this doctrine.[1]

[1] *England*—Arundell v. Phipps, 10 Ves. 139; Martindale v. Booth, 3 B. & A. 498; Eastwood v. Brown, Ry. & Mood. 312; Orlabar v. Harwar, Comb, 348; Hoffman v. Pitt, 5 Esp. 22; Latimer v. Batson, 4 B. & C. 652; Benton v. Thornhill, 2 Marsh, 427; s. c. 7 Taunt. 149; Martin v. Podger, 2 W. Bl. 701; s. c. 5 Burr. 2631; Carr v. Burdiss, 5 Tyrw. 309; Eveleigh v. Purrsford, 2 Mood. & Rob. 539; Lindon v. Sharp, 6 M. & G. 895; Macdona v. Swiney, 8 Ir. Law (N. S.) 73. *Contra*, Edwards v. Harben, 2 T. R. 587; Wordall v. Smith, 1 Camp. 332; Paget v. Perchard, 1 Esp. 205; Legerd v. Linley, Clayt. 38. *Maine*—Haskell v. Greely, 3 Me. 425; Reed v. Jewett, 5 Me. 96; Ulmer v. Hills, 8 Me. 326; Bartlett v. Blake, 37 Me. 124; Googins v. Gilmore, 47 Me. 9. *Massachusetts*—Brooks v. Powers, 15 Mass. 244; Shumway v. Rutter, 24 Mass. 56; s. c. 25 Mass. 443; Macomber v. Parker, 31 Mass. 497; s. c. 30 Mass. 175; Fletcher v. Willard, 31 Mass. 464; Allen v. Wheeler, 70 Mass. 123; Towne v. Fiske, 127 Mass. 125. *New York*—Smith v. Acker, 23 Wend. 653; Cole v. White, 26 Wend. 511; s. c. 24 Wend. 116; Hanford v. Artcher, 4 Hill, 271; s. c. 1 Hill, 347; Beals v. Guernsey, 8 Johns. 446; Bissell v. Hopkins, 3 Cow. 166; Stewart v. Slater, 6 Duer, 83; Swift v. Hart, 12 Barb. 530; Butts v. Swartout, 2 Cow. 431; Hall v. Tuttle, 8 Wend. 375; Prentiss v. Slack, 1 Hill, 467; Fuller v. Acker, 1 Hill, 473; Lewis v. Stevenson, 2 Hall, 63; Groat v. Rees, 20 Barb. 26; Butler v. Miller, 1 N. Y. 496; Thompson v. Blanchard, 4 N. Y. 303; Van Buskirk v. Warren, 39 N. Y. 119; s. c. 34 Barb. 457; 13 Abb. Pr. 145; 4 Abb. Ap. 457; Miller v. Lockwood, 32 N. Y. 293. *Contra*, Sturtevant v. Ballard, 9 Johns. 337; Williams v. Lowndes, 1 Hall, 579; Divver v. McLaughlin, 2 Wend. 596; Doane v. Eddy, 16 Wend. 523; Collins v. Brush, 9 Wend. 198; Randall v. Cook, 17 Wend. 53; Stevens v. Fisher, 19 Wend. 181; Walker v. Snediker, Hoff. 145; Gardner v. Adams, 12 Wend. 297. *New Jersey*—Miller v. Pancoast, 29 N. J. 250. *Contra*, Chumar v. Wood. 6 N. J. 155. *Virginia*—Davis v. Turner, 4 Gratt. 422; Forkner v. Stewart, 6 Gratt. 197; Howard v. Prince, 11 N. B. R. 322. *Contra*, Williamson v. Farley, Gilmer, 15; Alexander v. Deneale, 2 Munf. 341; Robertson v. Ewell, 3 Munf. 1; Land v. Jeffries, 5 Rand. 211, 599; Claytor v. Anthony, 6 Rand. 285; Hardaway v. Manson, 2 Munf. 230; Lewis v. Adams, 6 Leigh, 320; Mason v. Bond, 9 Leigh, 181; Tavenner v. Robinson, 2 Rob. 280; Glasscock v. Batton, 6 Rand. 78. *North Carolina*—Cox v. Jackson, 1 Hayw. 423; Vick v. Keyes, 2 Hayw. 126; Falkner v. Perkins, 2 Hayw. 224; Trotter v. Howard, 1 Hawk. 320; Smith v. Niel, 1 Hawk. 341; Rea v. Alexander, 5 Ired. 644; State v. Bethune, 8 Ired. 139. *Contra*, Gaither v. Mumford, 1 N. C. T. R. 167. *South*

ACTUAL, NOT MERELY CONSTRUCTIVE, CHANGE OF POSSESSION.—The change of possession required by the rule

Carolina—Terry v. Belcher, 1 Bailey, 568; Smith v. Henry, 2 Bailey 118. *Contra*, Kennedy v. Ross, 2 Mills, 125; De Bardleben v. Beekman, 1 Dessau, 346. The only exception to the rule in this State is that of a sale to a creditor in consideration of an existing debt. In case of such a preference there must be a change of the possession. Smith v. Henry, 1 Hill (S. C.), 16; Anderson v. Fuller, 1 McMullan Ch. 27; Fullmore v. Burrows, 2 Rich. Eq. 96; Jones v. Blake, 2 Hill Ch. 629. *Georgia*—Butler v. Roll, Geo. Decis. Part I, 37; Peck v. Land, 2 Geo. 1; Carter v. Stanfield, 8 Geo. 49. *Alabama*—Hobbs v. Bibb, 2 Stew. 54; Ayres v. Moore, 2 Stew. 336; Martin v. White, 2 Stew. 162; Blocker v. Burness, 2 Ala. 354; Killough v. Steele, 1 Stew. & Port. 262; Borland v. Walker, 7 Ala. 269; Mayer v. Clark, 40 Ala. 259; Moog v. Bendicks, 49 Ala. 512; Crawford v. Kirksey, 55 Ala. 282. *Contra*, Planters' Bank v. Borland, 5 Ala. 531; Borland v. Mayo, 8 Ala. 104; Mauldin v. Mitchell, 14 Ala. 814; Millard v. Hall, 24 Ala. 209. *Mississippi*—Carter v. Graves, 7 Miss. 9; Bogard v. Gardley, 12 Miss. 302; Rankin v. Holloway, 11 Miss. 614; Comstock v. Rayford, 9 Miss. 423; s. c. 20 Miss. 369; Summers v. Roos, 43 Miss. 749; Jayne v. Dillon, 27 Miss. 283. *Louisiana*—Keller v. Blanchard, 19 La. An. 53; Louisiana v. Baillio, 15 La. An. 555; Guice v. Sanders, 21 La. An. 463; Haile v. Brewster, 13 La. An. 155; Sullice v. Gradenigo, 15 La. An. 582. *Contra*, Jorda v. Lewis, 1 La. An. 59; Zacharie v. Kirk, 14 La. An. 433. *Texas*—Bryant v. Kelton, 1 Tex. 415; Morgan v. Republic, 2 Tex. 279; McQuinnay v. Hitchcock, 8 Tex. 33; Converse v. McKee, 14 Tex. 20; Earle v. Thomas, 14 Tex. 583; Gibson v. Hill, 21 Tex. 225. *Arkansas*—Field v. Simco, 7 Ark. 269; Cocke v. Chapman, 7 Ark. 197; Stone v. Waggoner, 8 Ark. 204; George v. Norris, 23 Ark. 121. *Tennessee*—Callen v. Thompson, 3 Yerg. 475; Darwin v. Handley, 3 Yerg. 502; Young v. Pate, 4 Yerg. 164; Grubbs v. Greer, 5 Cold. 160. *Contra*, Ragan v. Kennedy, 2 Tenn. 91. *Ohio*—Rogers v. Dare, Wright, 136; Burbridge v. Seely, Wright, 359; Hombeck v. Vanmetre, 9 Ohio, 153. *Indiana*—Foley v. Knight, 4 Blackf. 420; Watson v. Williams, 4 Blackf. 26; Hankins v. Ingolls, 4 Blackf. 35; Jones v. Gott, 9 Ind. 240; Nutter v. Harris, 9 Ind. 88; Kane v. Drake, 27 Ind. 29; Rose v. Colter, 76 Ind. 590. *Wisconsin*—Whitney v. Brunette, 3 Wis. 621; Smith v. Welch, 10 Wis. 91; Bullis v. Borden, 21 Wis. 136; Bond v. Seymour, 1 Chand. 40; Sterling v. Ripley, 3 Chand. 166. *Michigan*—Jackson v. Dean, 1 Doug. 519; Molitor v. Robinson, 40 Mich. 200. *Kansas*—Phillips v. Reitz, 16 Kans. 396. *Nebraska*—Robinson v. Uhl, 6 Neb. 328; Densmore v. Tomer, 11 Neb. 118; Miller v. Morgan, 11 Neb. 121. *Minnesota*—Braley v. Byrnes, 25 Minn. 297; Molm v. Barton, 27 Minn. 530. *United States*—Warner v. Norton, 20

is an actual, and not a merely constructive change. An actual change, as distinguished from that which by the mere intendment of the law follows the transfer of the title, is an open, visible, public change, manifested by such outward signs as render it evident that the possession of the owner, as such, has wholly ceased.[1] The possession of the vendor is always constructively the possession of

How. 448. *Contra*, Hamilton v. Russell, 1 Cranch, 309. *Canada*—Hunter v. Corbett, 7 U. C. (Q. B.) 75.

CONTRA.—*Vermont*—Mott v. McNiel, 1 Aik. 162; Weeks v. Wead, 2 Aik. 54; Fuller v. Sears, 5 Vt. 527; Durkee v. Mahoney, 1 Aik. 116; Beattie v. Robin, 2 Vt. 181. *New Hampshire*—Coburn v. Pickering, 3 N. H. 415; Page v. Carpenter, 10 N. H. 77; Paul v. Crooker, 8 N. H. 288; Shaw v. Thompson, 43 N. H. 130. *Contra*, Haven v. Low, 2 N. H. 13. The doctrine in this State rests upon the theory of a secret trust: Coburn v. Pickering, 3 N. H. 415. Secrecy establishes it: Trask v. Bowers, 4 N. H. 309. Notoriety has a tendency to repel it: Paul v. Crooker, 8 N. H. 288. *Connecticut*—Patten v. Smith, 4 Conn. 450; s. c. 5 Conn. 196; Swift v. Thompson, 9 Conn. 63; Crouch v. Carrier, 16 Conn. 505; Osborne v. Tuller, 14 Conn. 529. *Pennsylvania*—Babb v. Clemsen, 10 S. & R. 419; Clow v. Woods, 5 S. & R. 275; Hoofsmith v. Cope, 6 Whart. 53; Milne v. Henry, 40 Penn. 352; Eagle v. Eichelberger, 6 Watts, 29. *Delaware*—Bowman v. Herring, 4 Harring. 458. *Florida*—Gibson v. Love, 4 Fla. 217; Sanders v. Pepoon, 4 Fla. 465. *Kentucky*—Goldsbury v. May, 1 Litt. 254; Dale v. Arnold, 2 Bibb. 605; Grimes v. Davis, 1 Litt. 241; Middleton v. Carrol, 4 J. J. Marsh, 143; Waller v. Todd, 3 Dana, 503; Wash v. Medley, 1 Dana, 269. *Illinois*—Rhines v. Phelps, 8 Ill. 455; Thornton v. Davenport, 2 Ill. 296; Dexter v. Parkins, 22 Ill. 143; Ketchum v. Watson, 24 Ill. 591; Bay v. Cook, 31 Ill. 336; Corgan v. Frew, 39 Ill. 31; Johnson v. Holloway, 82 Ill. 334; Lewis v. Swift, 54 Ill. 436. *Missouri*—Claflin v. Rosenberg, 42 Mo. 439; s. c. 43 Mo. 593; Sibly v. Hood, 3 Mo. 290; Foster v. Wallace, 2 Mo. 231; King v. Bailey, 6 Mo. 575. *Contra*, s. c. 8 Mo. 332; Shepherd v. Trigg, 7 Mo. 151; Ross v. Crutsinger, 7 Mo. 245; Kuykendall v. McDonald, 15 Mo. 416; State v. Smith, 31 Mo. 566; State v. Evans, 38 Mo. 150; Middleton v. Hoff, 15 Mo. 415; Howell v. Bell, 29 Mo. 135. *California Code*—Fitzgerald v. Gorham, 4 Cal. 289; Whitney v. Stark, 8 Cal. 514. *Nevada*—Doack v. Brubacker, 1 Nev. 218. *Oregon*—Monroe v. Hussey, 1 Oregon, 188. This subject is regulated by statute in Delaware, California, Nevada, and Missouri.

[1] Cutter v. Copeland, 18 Me. 127.

the vendee; the possession of an agent is constructively the possession of his principal. If the change is merely constructive, the presumption of fraud arises.[1] When the facts are uncontroverted, the question whether their effect is to constitute an actual change of possession is a question of law.[2] If the property is left in the possession of the vendor's agent, the change of possession is only constructive.[3] If the vendee has possession of the property conjointly with the vendor, there is no actual change of possession.[4] If the vendor was never the ostensible owner,[5] or if the property was in the possession of another,[6] then the omission to take possession raises no presumption of fraud. If there is a change within a reasonable time after the sale, the transfer will be deemed valid.[7] But if a change of possession does not take place within a reasonable time after the sale, a change prior to an execution is not sufficient to repel the presumption of fraud.[8] If there is no change, a purchaser from the vendee will stand in the same condition as his vendor, the intermediate purchaser, and the presumption will be that both sales were fraudulent as against the creditors of the first vendor.[9] It has been held that no presumption of a fraudulent

[1] Hanford v. Artcher, 4 Hill, 271; s. c. 1 Hill, 347; Randall v. Parker, 3 Sandf. 69; Otis v. Sill, 8 Barb. 102; Grant v. Lewis, 14 Wis. 487; Lesem v. Herriford, 44 Mo. 323; Osen v. Sherman, 27 Wis. 501; Burnham v. Brennan, 42 N. Y. Sup. 49.

[2] McCarthy v. McQuade, 31 N. Y. Sup. 387.

[3] Brunswick v. McClay, 7 Neb. 137.

[4] Osen v. Sherman, 27 Wis. 501.

[5] Burling v. Patterson, 9 C. & P. 570.

[6] Smith v. Post, 3 N. Y. Supr. 647.

[7] Allen v. Cowan, 23 N. Y. 502; s. c. 28 Barb. 99; Trieber v. Andrews, 31 Ark. 163.

[8] Stimson v. Wrigley, 86 N. Y. 332; Dubeter v. Swartwood, 17 N. Y. Supr. 34.

[9] Lesem v. Herriford, 44 Mo. 323.

intent arises where the sale took place before the debt arose;[1] but this can not be so, for the natural tendency of the retention of possession is to give the vendor a false credit.

Burden of Proof.—The presumption is not merely a presumption of a fraudulent intent on the part of the vendor, but also of a concurrence in that intent on the part of the vendee. The possession in the vendor, therefore, is all that need be shown, in the first instance, by the creditor contesting the validity of the transaction, and, that being shown, the statute presumes it to be fraudulent.[2] The burden is then thrown upon the vendee to show, from all the circumstances surrounding the transaction, its true character, in order to repel the presumption of fraud,[3] and the evidence in explanation ought to be so clear as to leave no room to doubt the fairness of the sale.[4] If no evidence is given, the presumption becomes conclusive.[5]

Point of Inquiry.—The presumption is a presumption of a fraudulent intent on the part of the vendor and of participation in it on the part of the vendee. An inquiry, therefore, into the motives, reasons and causes

[1] Knight v. Forward, 63 Barb. 311.

[2] Kuykendall v. Hitchcock, 15 Mo. 416; Blant v. Gabler, 77 N. Y. 461.

[3] Kuykendall v. Hitchcock, 15 Mo. 416; Davis v. Turner, 4 Gratt. 422; Comstock v. Rayford, 20 Miss. 369; s. c. 9 Miss. 423; Mills v. Walton, 19 Tex. 271; Grant v. Lewis, 14 Wis. 487; McCarthy v. McQuade, 31 N. Y. Supr. 387.

[4] Smith v. Henry, 2 Bailey, 118; s. c. 1 Hill, 16; Davis v. Turner, 4 Gratt. 422; Jones v. Blake, 2 Hill Ch. 629.

[5] Carter v. Graves, 7 Miss. 9; Carter v. Stanfield, 8 Geo. 49; Beers v. Dawson, 8 Geo. 556; Allen v. Cowan, 23 N. Y. 502; s. c. 28 Barb. 99; Mayer v. Webster, 18 Wis. 393; State v. Smith, 31 Mo. 566; State v. Rosenfield, 35 Mo. 472; Chatham v. Hawkins, 76 N. C. 335.

for not changing the possession, is irrelevant so far as it is designed to raise any distinct question for the determination of either the court or the jury. The true and sole inquiry is, whether the presumption of fraud is repelled by the evidence.[1] The court has no power to say what particular facts shall or shall not be sufficient evidence of honest intention. Its only power is to determine what facts are admissible and relevant to determine the issue. Any facts which impress the mind with a conviction that the sale was honest and *bona fide*, and was not designed as a mere trick to cover the property, should be submitted to the jury.[2] No explanation can be more satisfactory than that the possession was retained for a fair and honest purpose.[3] There is no more satisfactory mode of disproving bad motives than by proving such facts as indicate the existence of other motives, innocent at least, or even laudable.[4] The intention of the parties, and the circumstances attending the transaction, may always be shown in order to repel the presumption.[5] All facts or circumstances which to the common understanding and conscience of men may prove, or on their face tend to prove good faith, are accordingly within the rightful privilege of the jury to hear and weigh. All facts, such as commonly accompany and indicate good faith, ought to be permitted to go to them. It is, therefore, proper to prove the payment of a valid and adequate consideration, the notoriety of the transaction, the attending circumstances, the relation of the parties, the facts indicating a fair intent,[6] the

[1] Stewart v. Slater, 6 Duer, 83.
[2] Stoddard v. Butler, 20 Wend. 507, per Senator Dickinson.
[3] Davis v. Turner, 4 Gratt. 422. [4] Smith v. Acker, 23 Wend. 653.
[5] Holmes v. Crane, 19 Mass. 607.
[6] Cole v. White, 26 Wend. 511; s. c. 24 Wend. 116.

reasonableness, as to amount, time, value and quantity of property, the difficulty or inconvenience of removal, the advantages of allowing it to remain, or any other circumstances agreeable with the ordinary course of business and fair dealing, which may tend to rebut the presumption, and satisfy the jury that there was not any intent to hinder, delay or defraud creditors.[1] All such proof of facts is subject to the general rules of the law of evidence.[2]

CONSIDERATION.—Whether proof of a consideration is essential will depend upon circumstances. Title once acquired by gift is not divested by the mere fact that the donee does not immediately take the property into his exclusive possession and appropriate it to his exclusive use.[3] But if the condition of the debtor is such at the time the transaction takes place that a gift would not be valid, then proof of a consideration is indispensable. It is only on the proof of a good consideration that the case can go to the jury on the question of fraud. The proof must go beyond a mere paper acknowledgment of it. There must be evidence *dehors* the instrument. An acknowledgment in the deed is of no force whatever in establishing the consideration as against creditors.[5] If the consideration is nothing more than what in law is considered a valuable consideration, it will not be sufficient, because a disproportion between the price paid and the value, when unreasonable, is evidence of a secret trust and

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[1] Smith v. Acker, 23 Wend. 653; Callen v. Thompson, 3 Yerg. 475.

[2] Cole v. White, 26 Wend. 511; s. c. 24 Wend. 116.

[3] Danley v. Rector, 10 Ark. 211.

[4] Tift v. Barton, 4 Denio, 171; Curd v. Lewis, 7 Gratt. 185.

[5] Allen v. Cowan, 28 Barb. 99; s. c. 23 N. Y. 502; Hanford v. Artcher, 4 Hill, 271; s. c. 1 Hill, 347.

creates a presumption of fraud.[1] Cases in which the question of inadequacy of consideration arises between the grantor and grantee of a deed, where suit is instituted for the purpose of setting aside the grant on the ground of imposition, are not applicable in determining a question of the fairness of a consideration between a vendee and creditor under the statute concerning fraudulent conveyances. What inadequacy of consideration would induce a court to set aside a conveyance at the instance of the grantor on the ground of imposition, is an entirely different question from that of degree of inadequacy which will avoid a sale on the ground of fraud in a suit by a creditor against the vendee. Courts will not weigh the value of the goods sold and the price received in very nice scales, but, all circumstances considered, there must be a reasonable and fair proportion between the one and the other.[2] The payment of an adequate price for the property affords a strong indication of good faith, and is a circumstance to weaken the presumption; but still this alone may not be inconsistent with the existence of a collusive design to impose upon others.[3] Any intention to give the debtor a false credit will vitiate the transaction, for transfers made for the purpose of deceiving creditors are fraudulent.[4]

Vendor's Means.—Evidence that the vendor at the time of the sale had other property far more than sufficient to pay all his debts, tends to rebut the presumption.[5]

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[1] Bryant v. Kelton, 1 Tex. 415; Kuykendall v. Hitchcock, 15 Mo. 416. *Contra*, Keller v. Blanchard, 19 La. An. 53.

[2] Kuykendall v. Hitchcock, 15 Mo. 416; State v. Evans, 38 Mo. 150.

[3] Smith v. Acker, 23 Wend. 653; Bryant v. Kelton, 1 Tex. 415; Rose v. Colter, 76 Ind. 590.

[4] Holmes v. Crane, 19 Mass. 607; D'Wolf v. Harris, 4 Mason, 515; s. c. 4 Pet. 147; Ross v. Crutsinger, 7 Mo. 245.

[5] Rose v. Colter, 76 Ind. 590.

PROVINCE OF A JURY.—The whole circumstances should be submitted to the jury, and from all parts of the transaction taken together, it should be determined whether the transaction was or was not fraudulent in the concoction of it.[1] If there is no proof to rebut the presumption, there is nothing to be left to the jury to pass upon.[2] If there is any evidence of good faith, the court, in submitting the question, should instruct the jury that, because the possession is not changed, the law presumes the transfer to be fraudulent and void as against creditors, and casts the burden of disproving fraud upon the person claiming under it.[3] If he fails in his evidence to show that the transfer was made in good faith, without any intent to defraud creditors, the presumption of fraud first raised by the law becomes conclusive.[4] If the verdict is clearly erroneous, the court may grant a new trial.[5]

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[1] Haven v. Low, 2 N. H. 13; Holmes v. Crane, 19 Mass. 607; Hollacher v. O'Brien, 12 N. Y. Supr. 277; Kans. Pac. R. R. Co. v. Crouse, 17 Kans. 571.

[2] Tift v. Barton, 4 Denio, 171; Curd v. Lewis, 7 Gratt. 185.

[3] Griswold v. Sheldon, 4 N. Y. 580; Smith v. Welch, 10 Wis. 91; Smith v. Henry, 2 Bailey, 118; s. c. 1 Hill, 16; Gibson v. Hill, 21 Tex. 225; Hartman v. Vogel, 41 Mo. 570.

[4] Kuykendall v. Hitchcock, 15 Mo. 416; Morgan v. Bogue, 7 Neb. 429. The vendor may remain in possession until performance of condition by vendee. Scott v. Winship, 20 Geo. 429. A partner may buy out the firm goods, employ his copartner, and continue to use the firm name. Hamill v. Willett, 6 Bosw. 533. The law does not require that the vendor, acting as agent, should make known his agency to others to make his acts effectual in behalf of his principal. His failing to do so is mere evidence of fraud. Cutter v. Copeland, 18 Me. 127. A sleigh purchased in the summer may be left with the vendor till winter. Clute v. Fitch, 25 Barb. 428.

[5] Vance v. Phillips, 6 Hill, 433; Dodd v. McCraw, 8 Ark. 83; Potter v. Payne, 21 Conn. 361; Randall v. Parker, 3 Sandf. 69. It is carrying a distrust of juries too far to suppose them incapable, with the aid of a wholesome *prima facie* presumption, to administer justice on this subject in the true spirit of the statute. It is better to confine the interposition

To what Transactions the Rule applies.—The reason why the retention of possession raises a presumption of fraud, is because it tends to deceive creditors by giving the debtor a false credit, and because it is out of the ordinary course of business, and therefore indicates a secret trust. It is manifest that these reasons apply equally to all transactions, no matter what may be the form of the transfer. The manner in which the parties deal is merely evidence to show good faith. The rule is one in regard to the burden of proof, and the character of the instrument of transfer and the mode of making it are matters having more or less weight to show the fairness of the transaction. It applies to a concurrent possession,[1] mortgages,[2] especially after default,[3] deeds containing a stipulation for the possession,[4] and sales under legal process,[5] whether the purchase is by the plaintiff [6] or a third

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of the court to guiding instead of driving them by instructions and to the power of granting new trials in cases of plain deviation. Davis v. Turner, 4 Gratt. 422.

[1] Stadtler v. Wood, 24 Tex. 622.

[2] Hombeck v. Vanmetre, 9 Ohio, 153; Ryall v. Rolle, 1 Ves. 348; s. c. 1 Atk. 165; 1 Wils. 260; Miller v. Paucoast, 29 N. J. 250; Runyon v. Grosbon, 12 N. J. Eq. 86; Eveleigh v. Purrsford, 2 Mood. & Rob. 539; Merrill v. Dawson, 1 Hemp. 563; s. c. 11 How. 375; Killough v. Steele, 1 Stew. & Port. 262. *Contra*, Mitchell v. Beal, 8 Yerg. 134; Maney v. Killough, 7 Yerg. 440; Gist v. Pressley, 2 Hill Ch. 318; Desha v. Scales, 6 Ala. 356; Cutter v. Copeland, 18 Me. 127; Snyder v. Hitt, 2 Dana, 204.

[3] Maney v. Killough, 7 Yerg. 440; Bank v. Gourdin, Speers Ch. 439; Shurtleff v. Willard, 36 Mass. 202; Bogard v. Gardley, 12 Miss. 302; Hankins v. Ingolls, 4 Blackf. 35; Wiswall v. Ticknor, 6 Ala. 178; Ravisies v. Alston, 5 Ala. 297; North v. Crowell, 11 N. H. 251; Stimson v. Wrigley, 86 N. Y. 332. *Contra*, Fishburne v. Kunhardt, 2 Speers, 556.

[4] Sommerville v. Horton, 4 Yerg. 541.

[5] Gardinier v. Tubbs, 21 Wend. 169; Floyd v. Goodwin, 8 Yerg. 484; Creagh v. Savage, 14 Ala. 454; Williams v. Kelsey, 6 Geo. 365; Stovall v. Farmers' Bank, 16 Miss. 305; Woodworth v. Woodworth, 21 Barb. 343; O'Brien v. Chamberlain, 50 Geo. 285; Master v. Webb, 26 N. Y.

person.[1] In all transactions of this kind, when a valuable consideration is proved, the only question that remains is one of good or bad faith.[2] The rule in regard to the retention of possession applies to *choses in action* as well as to personal property,[3] especially if they are negotiable.[4]

POSSESSION OF LAND.—The rule that possession is presumptive evidence of fraud, does not apply to conveyances of land. The reason for the distinction is manifest. In the case of chattels, possession is *prima facie* evidence of ownership. Upon this evidence of ownership creditors have a right to rely; otherwise there would be no protection against secret or collusive transfers. But while possession of land may be treated for some purposes and is regarded as the lowest evidence of title, yet the public look not to the possession, but to the title deeds or the proper records, to obtain proofs of title to such property. Creditors do this, and so does every person instituting an inquiry as to the condition of the title to a particular tract

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Supr. 172; Betz v. Conner, 7 Daly, 550. *Contra*, Garland v. Chambers, 19 Miss. 337; Foster v. Pugh, 20 Miss. 416; Ewing v. Cargill, 21 Miss. 79; Wyatt v. Stewart, 34 Ala. 716; Montgomery v. Kirksey, 26 Ala. 172; Guignard v. Aldrich, 10 Rich. Eq. 253.

[6] Farrington v. Caswell, 15 Johns. 430; Gardinier v. Tubbs, 21 Wend. 169; Taylor v. Mills, 2 Edw. Ch. 318.

[1] Fonda v. Gross, 15 Wend. 628; Breckenridge v. Anderson, 3 J. J. Marsh. 710; Kilby v. Haggin, 3 J. J. Marsh. 208.

[2] Latimer v. Batson, 4 B. & C. 652; Eveleigh v. Purrsford, 2 Mood. & Rob. 539. The reason for the conflict among the cases upon the points just considered is historical rather than logical. The mode of conveyance was first used to constitute an exception to the doctrine of fraud *per se*, and then some of the courts losing sight of this fact, considered it as constituting an exception to the rule of presumptive evidence.

[3] Welsh v. Bekey, 1 Penna. 57; Woodbridge v. Perkins, 3 Day, 364; Hall v. Redding, 13 Cal. 214; Currie v. Hart, 2 Sandf. Ch. 353; *vide* Browning v. Hart, 6 Barb. 91; Livingston v. Littell, 15 Wis. 218.

[4] Mead v. Phillips, 1 Sandf. Ch. 83.

of land. The possession may with perfect consistency be in one person and the title in another. No one need be deceived unless he will. To hold that possession of realty by the vendor after sale is *per se* presumptive evidence of fraud would be in effect to abolish the distinction known and acknowledged between personal and real property, and to lose sight of the different methods for evidencing the title to the two kinds of property.[1] But the possession of the grantor is proper to be submitted to the jury. It must be taken, however, in connection with all the circumstances of the case.[2] Acts of ownership[3] or possession for a long time[4] may raise a presumption of fraud.

POSSESSION WITH JUS DISPONENDI.—The mere retention of possession of personal property is altogether different from the retention of possession accompanied with a power to dispose of it for the grantor's own benefit. Such a power is equivalent to a power of revocation. It enables the vendor to defeat the transfer, and renders an instrument in which it is contained null and void according to the known principles of the common law.[5] The effect,

[1] Ryall v. Rolle, 1 Ves. 348; s. c. 1 Atk. 165; 1 Wils. 260; Clute v. Newkirk, 46 N. Y. 684; Cadogan v. Kennett, 2 Cowp. 432; Suiter v. Turner, 10 Iowa, 517; Steward v. Thomas, 35 Mo. 202; Hempstead v. Johnson, 18 Ark. 123; Wooten v. Clarke, 23 Miss. 75; Noble v. Coleman, 16 Ala. 77; Barr v. Hatch, 3 Ohio, 527; Smith v. Lowell, 6 N. H. 67; Collins v. Taggart, 57 Geo. 355; Tompkins v. Nichols, 53 Ala. 199; Apperson v. Burgett, 33 Ark. 328; Fuller v. Brewster, 53 Md. 358. *Contra*, Peck v. Land, 2 Geo. 1; Belk v. Massey, 11 Rich. 614; Bachemin v. Chaperon, 15 La. An. 4. When several lots are conveyed by one deed, the possession of a part of the property conveyed is *prima facie* evidence that the whole transaction, and not the transfer of the particular lot retained, is fraudulent. Perkins v. Patten, 10 Geo. 241.

[2] Steward v. Thomas, 35 Mo. 202; Barr v. Hatch, 3 Ohio, 527.

[3] Smith v. Lowell, 6 N. H. 67; Hancock v. Horan, 15 Tex. 507.

[4] Wooten v. Clarke, 23 Miss. 75; Noble v. Coleman, 16 Ala. 77.

[5] Lang v. Lee, 3 Rand. 410; Addington v. Etheridge, 12 Gratt. 436.

moreover, of such a power is to make the vendee hold the property for the use of the vendor, and a conveyance to the use of the grantor has always been deemed to be void whether it is fraudulent or not.[1] It also enables the vendor to hold himself out to the world as the owner, with every outward indication of ownership of the property which he so possesses and controls, and to obtain a false credit by means of such apparent ownership.[2] Besides, if such a transfer were held valid, it would enable the vendor to sell the property as he sees fit, use the proceeds for his own benefit, and exercise all the control and enjoy all the advantages of absolute owner in defiance of his creditors. It would enable him to hinder and delay them as long as he and his confidential vendee might deem proper.[3] Such a transfer is merely colorable, and operates in the most effectual manner to ward off creditors. As the legal effect of it is to delay, hinder and defraud creditors, the law imputes to it a fraudulent purpose, without regard to the actual motives of the parties.[4]

Possession with Power to Sell in Mortgages.—The power on the part of a mortgagor to sell and apply the proceeds to his own use is inconsistent with the nature and character of a mortgage. The object of such an instrument is to obtain a security beyond a simple reliance upon the honesty and ability of the debtor to pay, and to guard against the risk of all the property of the debtor

[1] Armstrong v. Tuttle, 34 Mo. 432; Spies v. Boyd, 1 E. D. Smith, 445; 11 Leg. Obs. 54; Brooks v. Wimer, 20 Mo. 503.

[2] Edgell v. Hart, 9 N. Y. 213; s. c. 13 Barb. 380. *In re* Manly, 3 N. B. R. 291; s. c. 2 Bond, 261; Hilliard v. Cagle, 46 Miss. 309.

[3] *In re* Kahley, 4 N. B. R. 378; s. c. 2 Biss. 383.

[4] Robinson v. Elliott, 11 N. B. R. 553; *in re* Manly, 3 N. B. R. 291; s. c. 2 Bond, 261; Hilliard v. Cagle, 46 Miss. 309.

being swept off by other creditors by fastening a special lien upon that covered by the mortgage. But a mortgage, with possession and power of disposition in the mortgagor for his own benefit, is nothing at last but a reliance upon the honesty of the mortgagor, and in fact is no security, as it is in the power of the mortgagor at any moment to defeat the mortgage lien by an entire disposition of the whole property. Such a mortgage is no certain security upon specific property. It depends entirely upon the honesty and good faith of the debtor. He may dispose of it to creditors at will to satisfy his debts, and there is no reason why creditors may not seize it against his will for the same object. In such case the whole right to dispose of the property to pay other debts depends on the will of the debtor, unaffected by the rights of the mortgagee, and there is no reason in permitting the will of the debtor to determine whether property shall legally go to pay his debts or not. If it is the will of the debtor to appropriate the mortgaged property to pay his debts, it is binding as against the mortgagee; but if it is not the will of the debtor, and the property is seized upon execution, the rights of the mortgagee, if the mortgage is valid, fasten upon the property and take it away from the execution creditor. The property, therefore, is not held by the mortgage, but the will of the debtor, because, if the debtor sees proper to dispose of it, he has the power under the mortgage. He may dispose of the property, defeat the mortgage, and put the money in his own pocket; but if he refuses to pay his debts and the property is taken on execution, the mortgagee steps in and restores it to the debtor. Such a mortgage is not an operative instrument between the parties. It is no security so far as the debtor is concerned, and its only operation and effect is to ward

off creditors. It is therefore fraudulent and void.[1] The

[1] Griswold v. Sheldon, 4 N. Y. 580; Spies v. Boyd, 1 E. D. Smith, 445; s. c. 11 Leg. Obs. 54; Carpenter v. Simmons, 1 Robt. 360; Shaw v. Lowry, Wright, 190; Edgell v. Hart, 13 Barb. 380; s. c. 9 N. Y. 213; Russell v. Winne, 37 N. Y. 591; s. c. 4 Abb. Pr. (N. S.) 384; Divver v. McLaughlin, 2 Wend. 596; Wood v. Lowry, 17 Wend. 492; Lachlan v. Wright, 3 Wend. 348; Mittnacht v. Kelley, 3 Abb. Ap. 301; Collins v. Myers, 16 Ohio, 547; Harman v. Abbey, 7 Ohio St. 218; Milburn v. Waugh, 11 Mo. 369; Brooks v. Wimer, 20 Mo. 503; Walter v. Wimer, 24 Mo. 63; Martin v. Maddox, 24 Mo. 575; Martin v. Rice, 24 Mo. 581; Stanley v. Bunce, 27 Mo. 269; Billingsley v. Bunce, 28 Mo. 547; Lodge v. Samuels, 50 Mo. 204; Tickner v. Wiswall, 9 Ala. 305; Johnson v. Thweatt, 18 Ala. 741; Price v. Mazange, 31 Ala. 701; Constantine v. Twelves, 29 Ala. 607; King v. Kenan, 38 Ala. 63; Lang v. Lee, 3 Rand, 410; Addington v. Etheridge, 12 Gratt. 436; Read v. Wilson, 22 Ill. 377; Ranlett v. Blodgett, 17 N. H. 298; Bishop v. Warner, 19 Conn. 460; Farmers' Bank v. Douglass, 19 Miss. 469; Place v. Longworthy, 13 Wis. 629; Welsh v. Beckey, 1 Penna. 57; Reed v. Blades, 5 Taunt. 212; Simpson v. Mitchell, 8 Yerg. 417; Doyle v. Smith, 1 Cold. 15; Hickman v. Perrin, 6 Cold. 135; Tennessee Nat. Bank v. Erbert, 9 Heisk. 153; Bowen v. Clark, 5 A. L. Reg. 203; Harvey v. Crane, 5 N. B. R. 218; s. c. 2 Biss. 496; Smith v. McLean, 10 N. B. R. 260; Robinson v. Elliott, 11 N. B. R. 553; s. c. 22 Wall. 513; Perry v. Shenandoah Bank, 27 Gratt. 755; Cator v. Collins, 2 Mo. Ap. 225; Garden v. Bodwing, 9 W. Va. 121; Stein v. Munch, 24 Minn. 390; Overman v. Quick, 8 Biss. 734; Harman v. Hoskins, 56 Miss. 142; Dunning v. Mead, 90 Ill. 376; Mann v. Flower, 25 Minn. 500; Crooks v. Stuart, 7 Fed. Rep. 800; Synge v. Synge, 4 Ir. Ch. 337; s. c. 3 Ir. Ch. 262; *in re* Asa Burrows, 7 Biss. 526; *in re* Erastus S. Bloom, 35 Leg. Int. 135; Johnson v. Patterson, 2 Woods, 443; *vide* Jones v. Huggeford, 44 Mass. 515; Briggs v. Parkman, 43 Mass. 258; Codman v. Freeman, 57 Mass. 306; Googins v. Gilmore, 47 Me. 9; Hughes v. Corey, 20 Iowa, 399; Jessup v. Bridge, 11 Iowa, 572; Wilhelmi v. Leonard, 13 Iowa, 330; Torbert v. Hayden, 11 Iowa, 435; Levy v. Welsh, 2 Edw. Ch. 438; Stedman v. Vickery, 42 Me. 132; Gay v. Bidwell, 7 Mich. 519; Mitchell v. Winslow, 2 Story. 630; Barnard v. Eaton, 56 Mass. 294; Oliver v. Eaton, 7 Mich. 108; Campbell v. Leonard, 11 Iowa, 489; Benton v. Thornhill, 2 Marsh. 427; s. c. 7 Taunt. 149; Brinley v. Spring, 7 Me. 241; Abbott v. Goodwin, 20 Me. 408; Macomber v. Parker, 31 Mass. 497; s. c. 30 Mass. 175; Brett v. Carter, 14 N. B. R. 301; Barron v. Morris, 14 N. B. R. 371; s. c. 2 Woods, 354; Eicks v. Copeland, 53 Tex. 581; Wait v. Bull's Head Bank, 19 N. B. R. 500.

terms of the instrument, however, must plainly express the right of mortgagor to dispose of the property, or the implication must be a necessary one.[1] A mere stipulation that property subsequently acquired shall be subject to the mortgage does not render it void.[2] But if there is a power to sell, a covenant to apply the proceeds towards replenishing and keeping up the stock will not render the instrument valid.[3] When there is a power to sell, the mortgage is void although the mortgagee does not know that there are any other creditors.[4]

Parol Power to Sell.—It is immaterial whether the power to sell the property is contained in the mortgage or is conferred by a parol agreement made at the time of its execution. If the mortgage is made and delivered under such an arrangement and with such a purpose, it is alike fraudulent and void, although the instrument does not on its face express that intent. It is because the instrument is made and delivered with intent that it shall operate in a manner which hinders, delays and defrauds creditors that it is void, and this intent may be proved by evidence *dehors* the instrument. The arrangement makes the instrument necessarily fraudulent, because it operates of necessity to hinder, delay and defraud creditors, by securing to the debtor the use and benefit of his property and its proceeds, while it protects it from levy and sale for the

[1] Voorhis v. Langsdorf, 31 Mo. 451; Sleeper v. Chapman, 121 Mass. 404; Kalk v. Fielding, 50 Wis. 339.

[2] Codman v. Freeman, 57 Mass. 306; Gardner v. McEwen, 19 N. Y. 123; Brinley v. Spring, 7 Me. 241; State v. Tasker, 31 Mo. 445; Voorhis v. Langsdorf, 31 Mo. 451; State v. Byrne, 35 Mo. 147; Hickman v. Perrin, 6 Cold. 135; Yates v. Olmstead, 56 N. Y. 632.

[3] Walter v. Wimer, 24 Mo. 63; Joseph v. Levi, 58 Miss. 843; Greenebaum v. Wheeler, 90 Ill. 296.

[4] Holmes v. Marshall, 78 N. C. 262.

payment of his debts.[1] It must be shown, however, that sales made by the mortgagor were made with the knowledge or consent of the mortgagee,[2] but this may be inferred from circumstances and the conduct of the parties.[3] The substantial character of the transaction is the same whether the agreement that the mortgagor may sell the goods be made at the time of the execution of the mortgage or immediately after. If the mortgagor continues to sell the goods with the knowledge of the mortgagee, the mortgage is void even though there was no express agreement to that effect at the time of executing the mortgage.[4] A sale by a mortgagor or vendor, when made contrary to the

[1] Collins v. Myers, 16 Ohio, 547; Griswold v. Sheldon, 4 N. Y. 580; Delaware v. Ensign, 21 Barb. 85; Freeman v. Rawson, 5 Ohio St. 1; s. c. 4 A. L. Reg. 693; Russell v. Winne, 37 N. Y. 591; s. c. 4 Abb. Pr. (N. S.) 384; Robbins v. Parker, 44 Mass. 117; Gardner v. McEwen, 19 N. Y. 123; Marston v. Vultee, 12 Abb. Pr. 143; New Albany Ins. Co. v. Wilcoxson, 21 Ind. 355; Howerton v. Holt, 23 Tex. 60; *in re* Kahley *et al.* 4 N. B. R. 378, 2 Biss. 383; *in re* Manly, 3 N. B. R. 291; s. c. 2 Bond, 261; Barnet v. Fergus, 51 Ill. 352; Steinart v. Deuster, 23 Wis. 136; Ross v. Wilson, 7 Bush. 29; Catlin v. Currier, 1 Saw. 7; Smith v. Ely, 10 N. B. R. 553; *in re* Samuel Cantrell, 6 Ben. 482; Jordan v. Turner, 3 Blackf. 309; Hilliard v. Cagle, 46 Miss. 309; Bishop v. Warner, 19 Conn. 460; Heuson v. Tootle, 72 Mo. 632; Nailer v. Young, 7 Lea. 755; Miller v. Jones, 15 N. B. R. 150; Hedman v. Anderson, 6 Neb. 392; Tallon v. Ellison, 3 Neb. 63; *in re* Wm. A. Foster, 18 N. B. R. 64; State v. Jacobs, 2 Mo. Ap. 183; *in re* Asa Burrows, 7 Biss. 526; Southard v. Benner, 72 N. Y. 424; s. c. 7 Daly, 40; McCrassley v. Hasslock, 4 Baxter, 1; Weber v. Armstrong, 70 Mo. 217; Wagner v. Johns, 7 Daly, 375; Brackett v. Harvey, 32 N. Y. Supr. 502; King v. Hubbell, 42 Mich. 597.

[2] Frost v. Warren, 24 N. Y. 204; Williston v. Jones, 6 Duer, 504; Summers v. Roos, 42 Miss. 749; Burgin v. Burgin, 1 Ired. 453; Sleeper v. Chapman, 121 Mass. 404.

[3] Macdona v. Swiney, 8 Ir. Law, N. S. 73; Allen v. Smith, 10 Mass. 308; Archer v. Hubbell, 4 Wend. 514; Hankins v. Ingolls, 4 Blackf. 35; Saunders v. Turbeville, 2 Humph. 272; Scott v. Winship, 20 Geo. 429; Barkow v. Sanger, 27 Wis. 500.

[4] Putnam v. Osgood, 52 N. H. 148.

purpose for which the property is left in his possession, will not vitiate the transfer.[1] If an article was left in the mortgage by mistake, an oral agreement that the mortgagor may sell it will not vitiate the mortgage.[2] A mere permission to sell inconsiderable portions of the property in particular instances is merely a badge of fraud.[3]

Power to Sell as Agent.—A mortgage containing a stipulation that the mortgagor shall remain in possession and sell the mortgaged property as agent of the mortgagee, and account for the proceeds until the mortgage debt is paid, is not necessarily void. If carried out in good faith it does not delay, hinder or defraud creditors. Such a stipulation is merely a badge of fraud.[4] But if the proceeds arising from the sales are to be applied to the debt only when collected, then the mortgage is void.[5] Whether

[1] *In re* Kahley, 4 N. B. R. 378; s. c. 2 Biss. 383; *in re* Manly, 3 N. B. R. 291; s. c. 2 Bond, 261.

[2] Allen v. Kennedy, 49 Wis. 549.

[3] Goodheart v. Johnson, 88 Ill. 58.

[4] Hawkins v. Nat'l Bank, 1 Dillon, 462; s. c. 2 N. B. R. 338; Miller v. Lockwood, 32 N. Y. 293; Ford v. Williams, 13 N. Y. 577; s. c. 24 N. Y. 359; Abbott v. Goodwin, 20 Me. 408; Melody v. Chandler, 12 Me. 282; Constantine v. Twelves, 29 Ala. 607; Chophard v. Bayard, 4 Minn. 533; Weaver v. Joule, 91 E. C. L. 309; s. c. 3 C. B. (N. S.) 309; Allen v. Smith, 10 Mass. 308; Barker v. Hall, 13 N. H. 298; Conkling v. Shelley, 28 N. Y. 360; Hickman v. Perrin, 6 Cold. 135; Pope v. Wilson, 7 Ala. 690; Brinley v. Spring, 7 Me. 241; Spence v. Bagwell, 6 Gratt. 444; Davis v. Ransom, 18 Ill. 396; Johnson v. Curtis, 42 Barb. 588; Summers v. Roos, 42 Miss. 749; Adler v. Claflin, 17 Iowa, 89; Wiswall v. Ticknor, 6 Ala. 178; Kleine v. Katzenberger, 20 Ohio St. 110; Farmers' Bank v. Cowan, 2 Abb. Ap. 88; Ostrander v. Fay, 3 Abb. Ap. 431; Vose v. Stickney, 19 Minn. 367; Goodheart v. Johnson, 88 Ill. 58; Crow v. Red River Co. Bank, 52 Texas, 362; Overman v. Quick, 17 N. B. R. 255; *vide* Saunders v. Turbeville, 2 Humph. 272; Trabue v. Willis, Meigs, 583, note; Bamford v. Baron, 2 T. R. 594, note; *in re* Wm. D. Forbes, 5 Biss. 510.

[5] City Bank v. Westbury, 23 N. Y. Supr. 458; Brackett v. Harvey, 32 N. Y. Supr. 502; Ball v. Slafter, 33 N. Y. Supr. 353.

the mortgagor may be allowed to retain any part of the proceeds as a compensation for his services depends upon the good faith of the arrangement and the amount so retained.[1]

PERISHABLE ARTICLES.—Articles in their nature subject to be consumed in their use may be mortgaged without any imputation of fraud, provided they are not to be used and may be kept without damage until the mortgage debt shall become payable.[2] If the articles, however, are perishable and cannot be so kept, or if there is an understanding that they may be used and consumed by the mortgagor, the mortgage is fraudulent and void.[3] Such perishable articles may, however, be consumed when it is for the benefit of the mortgagee rather than a favor to the debtor, as, for instance, in the improvement, support or sustenance of other property enumerated in the mortgage.[4] The amount in number and value of such articles may be so inconsiderable as compared with the main subjects of the mortgage as to justify the conclusion that they were embraced through the inattention of the parties, and will not then vitiate the transaction.[5] The rule in regard to perishable objects is limited to chattels that are transient

[1] Frankhouser v. Ellett, 22 Kans. 127; *vide* Greenebaum v. Wheeler, 90 Ill. 296; Joseph v. Levi, 58 Miss. 843.

[2] Robbins v. Parker, 44 Mass. 117; Dewey v. Littlejohn, 2 Ired. Eq. 495; Charlton v. Lay, 5 Humph. 496; Cochran v. Paris, 11 Gratt. 348.

[3] Sommerville v. Horton, 4 Yerg. 541; Trabue v. Willis, Meigs, 583, note; Wiley v. Knight, 27 Ala. 336; Farmers' Bank v. Douglass, 19 Miss. 469; Johnson v. Thweatt, 18 Ala. 741; Ravisies v. Alston, 5 Ala. 297; Gardner v. Johnston, 9 W. Va. 403; *vide* Elmes v. Sutherland, 7 Ala. 262.

[4] Cochran v. Paris, 11 Gratt. 348; Dewey v. Littlejohn, 2 Ired. Eq. 495; Ravisies v. Alston, 5 Ala. 297; Planters & Merchants' Bank v. Clarke, 7 Ala. 765; Sipe v. Earman, 26 Gratt. 563.

[5] Cochran v. Paris, 11 Gratt. 348; Dewey v. Littlejohn, 2 Ired. Eq. 495.

in their existence, or of such a nature that their only use consists in their consumption.[1]

WHAT TRANSFERS VALID.—It has been held that the doctrine in regard to the retention of possession, accompanied with a power to sell for the debtor's benefit, applies only to conditional, and not to absolute sales;[2] but this is manifestly not true, for such a transfer is merely colorable.[3] What will be the effect of a delivery of the possession to the vendee or mortgagee, is a question that can not be considered as yet settled. In one case the change took place before the term of credit allowed by the mortgage expired, and it was held that the mortgage was valid, for the parties thereby purged the instrument of the fraudulent provision.[4] In another case the mortgage was held valid against a claim which arose after the mortgagee took possession of the property.[5] But the weight of authority is that the transaction will not be rendered valid by taking possession before the levy of an execution.[6] If the mortgagor, however, delivers the property to the mortgagee to sell and pay the debt out of the proceeds, the last transfer is valid.[7]

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[1] Shurtleff v. Willard, 36 Mass. 202. [2] Grubbs v. Greer, 5 Cold. 160.
[3] Paget v. Perchard, 1 Esp. 205. [4] Brown v. Platt, 8 Bosw. 324.
[5] Williston v. Jones, 6 Duer, 504.
[6] Robinson v. Elliott, 22 Wall. 513; *in re* Wm. D. Forbes, 7 Biss. 510; Smith v. Ely, 10 N. B. R. 553; Dutcher v. Swartwood, 22 N. Y. Supr. 31; Stein v. Munch, 24 Minn. 390. *Contra*, Rowley v. Rice, 52 Mass. 333; Read v. Wilson, 22 Ill. 377; Summers v. Roos, 42 Miss. 749; Foster v. Saco Manuf. Co., 29 Mass. 451.
[7] First Nat'l Bank v. Anderson, 24 Minn. 435.

NOTE.—The doctrine in the text is laid down according to the principles of the common law, but these, of course, are liable to modification by the statutes of the various States. It is no part of the scope of this work to discuss these various acts, for it is to be presumed that every attorney is more familiar with the statutes of his own State, and the deci-

sions under them, than a stranger. The work, however, would not be complete without a slight notice of them, and of the manner in which they affect the doctrine relating to the retention of possession. These acts commonly relate to bills of sale and mortgages of personal property, and are designed to prevent the mischiefs that may arise from secret sales, and hence require that such transfers shall be recorded in all cases where the grantor retains the possession. Such acts are in force in England, Maine, Connecticut, New York, Maryland, Virginia, West Virginia, North Carolina, Georgia, Indiana, Kentucky, Missouri, Michigan, Kansas, Wisconsin, Minnesota, Iowa, Oregon, and Ohio. The statutes of each State vary, but in general the recording of the transfer is equivalent to a change of possession. Bruce v. Smith, 3 H. & J. 499; Hambleton v. Hayward, 4 H. & J. 443; Bogard v. Gardley, 12 Miss. 302; Harrington v. Brittain, 23 Wis. 541; Fister v. Beall, 1 H. & J. 31; Smith v. McLean, 24 Iowa, 322; Hughes v. Corey, 20 Iowa, 399; Kuhn v. Graves, 9 Iowa, 303; Barker v. Hall, 13 N. H. 298; Call v. Gray, 37 N. H. 428; Frankhouser v. Ellet, 22 Kans. 27. When there is a change of possession (Minister v. Price, 1 F. & F. 686; Gough v. Everard, 2 H. & C. 1; s. c. 32 L. J. Ex. 210; s. c. 8 L. T. (N. S.) 263; Smith v. Wall, 18 L. T. (N. S.) 182); or when the property at the time of the transfer is not in the possession of the grantor (Thomas v. Hillhouse, 17 Iowa, 67), the instrument by which the transfer is made need not be recorded. But if the grantor retains the possession, and the instrument is not recorded within the time required by the registration acts, the transfer is void. Miller v. Bryan, 3 Iowa, 58; Prather v. Barker, 24 Iowa, 26. Mere recording, however, will not give validity to an instrument that is tainted with fraud. Garrett v. Hughlett, 1 H. & J. 3; Robinson v. Elliott, 11 N. B. R. 553; *in re* Manly, 3 N. B. R. 291; s. c. 2 Bond, 261.

CHAPTER VI.

WHEN POSSESSION IS FRAUD PER SE.

The retention of possession has thus far been considered as simply affording a presumption of fraud, but as it is held to be conclusive in several States, a survey of this branch of the law is necessary to complete the examination of this subject. It is impossible, however, to give more than a general outline, for the rule that the retention of possession is fraud *per se* is conceded to be merely one of policy, and hence it varies in its application in each State, being rigid in some and lax in others. It, therefore, can not be said that this general outline is true in every particular as applied to any one State, but it merely gives the principles which are generally accepted.

NATURE OF THE RULE THAT POSSESSION IS FRAUD PER SE.—The rule that the retention of possession is conclusive evidence of fraud is one of policy,[1] and rests upon the doctrine that fraud is in all cases a question of law.[2] Although a valuable consideration may be paid, and the real intent of the parties may be to transfer the property, yet the possession continuing with the vendor is regarded as giving him a collusive credit, and as operating as a deceit and fraud upon creditors. The conveyance, therefore, is held

[1] Wilson v. Hooper, 12 Vt. 653; Mills v. Camp, 14 Conn. 219; Kirtland v. Snow, 20 Conn. 23.

[2] Weeks v. Wead, 2 Aik. 64; Milne v. Henry, 40 Penn. 352; Sturtevant v. Ballard, 9 Johns. 337; Planters' Bank v. Borland, 5 Ala. 531.

void as to creditors, though there may be no fraud, in fact, in the transaction.[1] The rule excludes all regard to the actual intentions of the parties in every transaction that comes within its range.[2] The inference arising from the possession can not be rebutted or repelled even by the strongest testimony of the actual fairness of the intention of the parties.[3] Hence, it is immaterial whether the vendee was party or privy to any fraudulent intention of the vendor or not.[4]

Character of Delivery. — The vendor must deliver to the vendee possession of the property in order to consummate the sale and render it valid as against creditors. The delivery must be actual, and such as the nature of the property and the circumstances of the sale will reasonably admit, and such as the vendor is capable of making. A mere symbolical or constructive delivery, where a real one is reasonably practicable, is of no avail; there must be an actual separation of the property from the possession of the vendor at the time of the sale, or within a reasonable time afterwards, according to the nature of the property.[5] Symbolical delivery is necessary only where peculiar circumstances preclude the possibility of actual possession, and there it is equivalent to actual possession, because the transaction is susceptible of no act of greater notoriety. But where possession may be permanently changed by actual delivery of the thing, symbolical delivery is of itself a fraud, because it appears on the face of

[1] Weeks v. Wead, 2 Aik. 64; Milne v. Henry, 40 Penn. 352.

[2] Wilson v. Hooper, 12 Vt. 653.

[3] Land v. Jeffries, 3 Rand. 211; s. c. 599; Hundley v. Webb, 3 J. J. Marsh. 643.

[4] King v. Bailey, 6 Mo. 575.

[5] Billingsley v. White, 59 Penn. 464.

the transaction that the delivery is merely colorable.[1] Actual possession is used in contradistinction to constructive possession, which is incident of, and dependent on, right and title.[2] The possession of every vendor, after a sale, is constructively the possession of the vendee; the possession of an agent is constructively the possession of the principal. Such a change, however, is not sufficient. The vendee cannot make the vendor his agent and then rely upon his constructive possession.[3]

CHANGE MUST BE CONTINUOUS.—The word actual also excludes the idea of a mere formal change of the possession.[4] It is not sufficient that the vendor gives to the vendee a delivery, which may be symbolical or a temporary delivery, and then takes the articles back into his own possession and keeps and uses them just the same as he did before. This is not the possession which the rule requires. There must be not only a delivery, but a continuing possession.[5] The possession and beneficial use of the property by the vendor, after the sale, is conclusive evidence against it. It is the policy and very foundation of the rule to prevent what it is the object of fraudulent conveyances to secure—the beneficial use of the property

[1] Cunningham v. Neville, 10 S. & R. 201; Brawn v. Keller, 43 Penn. 104; 3 Grant, 237.

[2] Woods v. Bugbey, 29 Cal. 466.

[3] Stoddard v. Butler, 20 Wend. 507; s. c. 7 Paige, 163; Trask v. Bowers, 4 N. H. 309; Stephens v. Barnett, 7 Dana, 257; Fitzgerald v. Gorham, 4 Cal. 289; Stewart v. Scannell, 8 Cal. 80; Stanford v. Scannell, 10 Cal. 7; Bentz v. Riley, 69 Penn. 71; Thompson v. Wilhite, 81 Ill. 356.

[4] Stevens v. Irwin, 15 Cal. 503.

[5] Young v. McClure, 2 W. & S. 147; Streeper v. Eckart, 2 Whart. 302; Goldsbury v. May, 1 Litt. 254; Breckenridge v. Anderson, 3 J. J. Marsh. 710; McBride v. McClelland, 6 W. & S. 94; Miller v. Garman, 69 Penn. 134; Miller v. Garman, 2 Pearson, 91.

to the debtor.[1] The delivery must be made of the property; the vendee must take the actual possession; the possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be accompanied with such unmistakable acts of control and ownership as a prudent *bona fide* purchaser would do in the exercise of his rights over the property, so that all persons may have notice that he owns and has possession of the property.[2] It must be such as to give evidence to the world of the claims of the new owner. This possession must be continuous—not taken to be surrendered back again—not formal, but substantial.[3] It is not necessary that a change of possession should at all times accompany the transfer. If it follows within a reasonable time thereafter, that is, as soon as the nature of the property and the circumstances attending the transfer will admit, it is sufficient.[4] What is a reasonable time must be determined according to the circumstances of each particular case.[5] It does not, however, depend upon the convenience of the vendee, but upon the

[1] Pierce v. Chipman, 8 Vt. 334.

[2] Lay v. Neville, 25 Cal. 545; Cutting v. Jackson, 56 N. H. 253.

[3] Stevens v. Irwin, 15 Cal. 503; Engles v. Marshall, 19 Cal. 320; Mead v. Noyes, 44 Conn. 487. Mere accidental words grow sometimes into undue importance. A learned judge of the Common Pleas happened, improperly, but without prejudice to any one, to apply the terms which qualify a possession under the statute of limitations to a case of this sort, and declared that the possession must be "actual, visible, notorious," and the reporter put this into his syllabus, though this court used only the word actual. Next comes another expression derived from the same source—"clear, unequivocal and conclusive." The expressions "visible and open," and "open and manifest," would seem to be more accurate. Hugus v. Robinson, 24 Penn. 9.

[4] Carpenter v. Mayer, 5 Watts, 483; Smith v. Stern, 17 Penn. 360; State v. King, 44 Mo. 238; McVicker v. May, 3 Penn. 224; Barr v. Reitz, 53 Penn. 256; McFarlan v. English, 74 Penn. 296.

[5] Bishop v. O'Connell, 56 Mo. 158.

time fairly required to perform the act of taking possession or doing what is equivalent.[1] A delay of four or six days is not material, if the property has not in the meantime been seized on legal process.[2]

QUESTION OF LAW.—The rule does not determine what acts shall constitute a delivery and continued change of possession.[3] Change of possession is mainly a fact like possession or seizin, but of course the facts being conceded, or found, all these matters then resolve themselves into a mere judgment of law.[4] The question of change of possession is purely one of law, and as such is to be decided by the court. The court must judge of those acts which are sufficient evidence of delivery.[5] Possession being a fraud in law, without regard to the intent of the parties, becomes a question for the court and not for the jury to decide.[6] When there is no proof to show that possession accompanied and followed the transfer, the court instructs the jury that the sale is fraudulent.[7] When, however, there is any evidence tending to prove a change of possession, the question must be submitted to the jury.[8] The

[1] Seymour v. O'Keefe, 44 Conn. 128.

[2] McVicker v. May, 3 Penn. 224; Barr v. Reitz, 53 Penn. 256.

[3] Godchaux v. Mulford, 26 Cal. 316.

[4] Burrows v. Stebbins, 26 Vt. 659.

[5] Cadbury v. Nolen, 5 Penn. 320; Burrows v. Stebbins, 26 Vt. 659; *contra*, Lake v. Morris, 30 Conn. 201.

[6] Young v. McClure, 2 W. & S. 147; Carpenter v. Mayer, 5 Watts, 483; Milne v. Henry, 40 Penn. 352.

[7] Young v. McClure, 2 W. & S. 147; Dewart v. Clement, 48 Penn. 413. In Connecticut the question is submitted to the jury as a question of fact, with instructions that if they find none of the established exceptions, they will find the transaction fraudulent. Swift v. Thompson, 9 Conn. 63; Howe v. Keeler, 27 Conn. 538.

[8] Warner v. Carlton, 22 Ill. 415; Stephenson v. Clark, 20 Vt. 624; Chamberlain v. Stern, 11 Nev. 268.

evidence must be such as would justify the jury in inferring, under instructions from the court, that there has been an actual and exclusive change of possession.[1] When there is a conflict of testimony in regard to the change of possession, the question must necessarily be referred to the jury. Should the court in such a case attempt to assert authoritatively the presence of a legal fraud, it would be a usurpation of the rights of the jury.[2] The question is to be submitted to the jury to find the facts, and the court is to say what facts, if found by the jury, will constitute a sufficient change of possession.[3] The rule is no reason for excluding the evidence of the transfer. It is the judgment of the law upon the evidence, and not a ground to exclude evidence.[4]

Joint Possession.—Possession is the visible control of and dominion over the goods.[5] If the vendee has such a possession it is sufficient. A concurrent possession of the vendor with the vendee,[6] or with an agent of the vendee,[7] is not such a substantial change as the rule requires. Such a possession is merely colorable. The reason why possession must be changed is to announce a change of ownership, and prevent the former owner from gaining a credit by his possession. Consequently the possession and use

[1] McKibbin v. Martin, 64 Penn. 352.

[2] Forsyth v. Matthews, 14 Penn. 100; Wilson v. Hooper, 12 Vt. 653; Hodgkins v. Hook, 23 Cal. 581.

[3] Burrows v. Stebbins, 26 Vt. 659; Stephenson v. Clark, 20 Vt. 624.

[4] Sherron v. Humphreys, 14 N. J. 217.

[5] Ludlow v. Hurd, 19 Johns. 218.

[6] Wordall v. Smith, 1 Camp. 332; Babb v. Clemson, 10 S. & R. 419; Boyd v. Dunlap, 1 Johns. Ch. 478; Stiles v. Shumway, 16 Vt. 435; Waller v. Cralle, 8 B. Mon. 11; Miller v. Garman, 69 Penn. 134; Regli v. McClure, 47 Cal. 612.

[7] Neate v. Latimer, 2 Y. & C. 257; Wordall v. Smith, 1 Camp. 332; Babb v. Clemson, 10 S. & R. 419.

of the vendor, to be within the rule, must be of the same description as that of a joint owner in using, occupying and disposing of the property. Nothing short of this would furnish any evidence that he yet remained the owner.[1] What given state of facts constitutes a concurrent possession is a question of law.[2] A concurrent possession is a mixed or uncertain possession apparently as much in one as in the other. There may be a concurrent possession, although there is no part ownership in the property. The possession is concurrent where the control and use of the property by the vendor and vendee are so confused and mixed as to leave the question of possession uncertain.[3] In order to constitute a concurrent possession it is not necessary that the person in actual possession shall have some interest in the property as part owner.[4] If the possession does not amount to a joint possession the transfer is valid. Thus, if a lease of the goods to a third party is real and *bona fide* and not colorable, and he actually takes possession, then his possession in connection with that of the vendor will not be fraudulent.[5] It is important, therefore, to ascertain what facts are essential to prevent the possession from being joint.

Character of the Change.—Separation of the property from the possession of the vendor implies nothing more than a change of the vendor's relation to it as owner, and consists in the surrender and transfer of his power and control over it to the vendee; but in order to prevent

[1] Allen v. Edgerton, 3 Vt. 442; Hall v. Parsons, 15 Vt. 358; s. c. 17 Vt. 271; Wilson v. Lott, 5 Fla. 305.

[2] Hall v. Parsons, 15 Vt. 358; s. c. 17 Vt. 271.

[3] Worman v. Kramer, 73 Penn. 378.

[4] Worman v. Kramer, 73 Penn. 378.

[5] Archer v. Hubbell, 4 Wend. 514.

fraud, the rule requires that this shall be done by such appropriate significant acts as shall clearly show the vendor's intention to part with the possession of the property and transfer it to the vendee.[1] There must be a complete change of the dominion and control over the property, and some act which will operate as a divestiture of title and possession from the vendor and a transfer to the vendee. There must be some open, notorious or visible act clearly and unequivocally indicative of delivery and possession, such as putting up a new sign, or any other reasonable means which would impart notice to a prudent man that a change had taken place.[2] The act must be so open and manifest as to make the change of possession apparent and visible.[3]

Must be Observable.—The change of possession must be such as is observable without inquiry. On the one hand, the purchaser must see to it that he so conducts with the property as to indicate by the appearances to an observer a change in the possession; and on the other hand, the creditors of the vendor are bound to see what others can see, and judge and act upon it with the prudence that is required of men in business affairs. The change of possession must be obvious or observable, or, as sometimes expressed, visible, or such that the appearances would indicate to an observer that there has been a change.[4] The appearances must indicate such a divesting of the possession of the vendor as any man knowing the facts which are ascertainable, would be bound to know

[1] Billingsley v. White, 59 Penn. 464; State v. Schulein, 45 Mo. 521.

[2] Claflin v. Rosenberg, 42 Mo. 439; 43 Mo. 593; Burgert v. Borchert, 59 Mo. 80; Mills v. Thompson, 72 Mo. 367.

[3] Billingsley v. White, 59 Penn. 464.

[4] Stanley v. Robbins, 36 Vt. 422; Weeks v. Prescott, 53 Vt. 57.

and understand as the result of change of ownership. They must be such as he could not reasonably misapprehend.[1] When such a change is apparent, creditors are put on the inquiry. The rule does not say that it is the duty of creditors to inquire or to presume a change when it is reasonably doubtful, but that the possession in such a case is joint and the sale void. This is in entire consistency with the settled rule that there must be a substantial and visible change of possession. If there is such a change, a careful observer will not be at a loss to determine who owns and has possession of the property. If it is doubtful, the law resolves the doubt against the party who should make the change of possession open and visible to the world. Creditors are not bound to inquire. It is sufficient if they carefully observe.[2]

Employment of Vendee.—If there are such palpable tokens and proofs of the vendor's surrender of his dominion over the property as owner, and of the transfer of his possession to the vendee, the sale will not be declared fraudulent in law, although the vendor may act as the agent or servant of the vendee in the management and disposal of the property, provided that his acts are professedly and apparently done, not as owner, but as the agent or servant of the vendee, and are so understood by those with whom he deals. Such employment of the vendor in a subordinate capacity is colorable only, and not conclusive upon the question as to whether there has been an immediate delivery and an actual change of the possession. He cannot be allowed to remain with apparently sole and exclusive possession of the goods after the sale,

[1] Stephenson v. Clark, 20 Vt. 624; Parker v. Kendricks, 29 Vt. 388.
[2] Flanagan v. Wood, 33 Vt. 332.

for that would be inconsistent with such an open and notorious delivery and actual change as the rule exacts, in order to exclude from the transaction the idea of fraud. But if it is apparent to all the world that he has ceased to be the owner, and another has acquired and openly occupied that position; that he has ceased to be the principal in the charge and management of the property, and become only a subordinate or clerk, the reason of the rule is satisfied.

The immediate delivery and actual and continued change of possession are the ultimate facts; the employment of the vendor by the vendee in a subordinate capacity is only a probative fact.[1] If the change of possession is otherwise sufficiently shown, the mere fact of such agency is not, and never has been held to render the sale invalid.[2] The omission to change the sign on a store is not conclusive.[3] Nor is a mere change of the sign sufficient.[4] It is not necessary that the vendor shall be at all times in the store,[5] but he must do something more than make occasional visits.[6] The same clerks may be employed, and it is immaterial where they board,[7] but they

[1] Godchaux v. Mulford, 26 Cal. 316; Bird v. Andrews, 40 Conn. 542.

[2] Billingsley v. White, 59 Penn. 464; State v. Schulein, 45 Mo. 521; Claflin v. Rosenberg, 42 Mo. 439; s. c. 43 Mo. 493; McKibbin v. Martin, 64 Penn. 352; Hugus v. Robinson, 24 Penn. 9; Dunlap v. Bournonville, 26 Penn. 72; England v. Insurance Co., 6 La. An. 5; Weil v. Paul, 22 Cal. 492; Godchaux v. Mulford, 26 Cal. 316; Warner v. Carlton, 22 Ill. 415; Powers v. Green, 14 Ill. 386; Stevens v. Irwin, 15 Cal. 503; Hall v. Parsons, 15 Vt: 358; s. c. 17 Vt. 271; Wilson v. Lott, 5 Fla. 305; Talcott v. Wilcox, 9 Conn. 134.

[3] Seavy v. Dearborn, 19 N. H. 351; Hugus v. Robinson, 24 Penn. 9; Read v. Wilson, 22 Ill. 377; *vide* Wright v. McCormick, 67 Mo. 426; Stern v. Henley, 68 Mo. 262; Peirce v. Merritt, 70 Mo. 275.

[4] Potter v. Payne, 21 Conn. 361.

[5] Billingsley v. White, 59 Penn. 464.

[6] Eckfeldt v. Frick, 4 Phila. 116.

[7] Hall v. Parsons, 15 Vt. 358; s. c. 17 Vt. 271; Ivancovich v. Stern, 14 Nev. 341.

cannot be employed and paid by the vendor, although he does it at the request of the vendee,[1] for the possession is then in the vendor and not the vendee. The rule requires that all such agency and control of the vendor shall be excluded. If the transfer is kept secret, the employment of the vendor as agent will vitiate it.[2] The important inquiry is, who is at the head controlling the property? If a careful observer would be at a loss to know which of the two were at the head, having the chief control of the property, it must be deemed a joint possession.[3]

WHEN EMPLOYMENT OF VENDOR IS FRAUDULENT.—In such cases of concurrent possession, it is a question for the jury whether the change of possession has been actual and *bona fide*, not pretended, deceptive, and collusive. If there are facts tending to show that the grantor has a beneficial interest in the business, or that the proceeds go to him beyond a reasonable compensation for his services, or that he has an unlimited power to draw upon the till, or that with the knowledge of the vendee he takes money to pay his own debts, these are facts for the jury.[4] The vendor may, however, become a member of the firm which purchases the property,[5] or act as agent for the owner of an undivided half of the property.[6] The vendee can not employ the former agent of the vendor, and then hire the property to the vendee,[7] but the vendor may be employed to use the property in the business of the vendee.[8] One

[1] Parker v. Kendricks, 29 Vt. 388.

[2] Trask v. Bowers, 4 N. H. 309; Allen v. Edgerton, 3 Vt. 442; Eckfeldt v. Frick, 4 Phila. 116.

[3] Allen v. Edgerton, 3 Vt. 442; Hall v. Parsons, 15 Vt. 358; s. c. 17 Vt. 271.

[4] McKibbin v. Martin, 64 Penn. 352.

[5] Utley v. Smith, 24 Conn. 290.

[6] Pier v. Duff, 63 Penn. 59.

[7] Hurlburd v. Bogardus, 10 Cal. 518.

[8] Brown v. Riley, 22 Ill. 45.

partner may purchase the interest of his copartner in the firm property and employ him in the business, for where the possession is joint, no other change can take place.[1] If A., being in possession of goods, sells them to B., and B. sells them to C., it is not fraudulent for C., after he has completely received the possession, to employ A. and allow him to have possession of the goods.

Possession of Land.—When the vendee relies upon a constructive possession of land to make out his possession of the property which remains upon the land, he must have such a deed as will vest in him a legal seizin, and it may be essential that the deed shall be recorded.[3] The deed, however, simply conveys the legal right of possession, but does not necessarily change the possession from the grantor to the grantee. Where the land sold remains in the actual possession of the vendor, there no constructive possession of the property on it can be raised, for the aid of the vendee, against such actual possession, for this would make the constructive possession more potential than the actual and apparent one.[4] Consequently, a mere surrender of a lease, which the vendor holds as tenant, to the vendee is not sufficient.[5] Where the vendor and vendee remain in the joint possession of the land, if the possession of the vendee is apparently that of a joint

[1] Criley v. Vasel, 52 Mo. 445.

[2] Cameron v. Montgomery, 13 S. & R. 128.

[3] Stephenson v. Clark, 20 Vt. 624.

[4] Flanagan v. Wood, 33 Vt. 332; Rockwood v. Collamer, 14 Vt. 141; Weeks v. Prescott, 53 Vt. 57; Myers v. Woods, 1 Phila. 24; Lawrence v. Burnham, 4 Nev. 361; Cahoon v. Marshall, 25 Cal. 197; Bishop v. O'Connell, 56 Mo. 158; *vide* Smith v. Skeary, 47 Conn. 47; Elmer v. Welch, 47 Conn. 56.

[5] Steelwagon v. Jeffries, 44 Penn. 407; Kirtland v. Snow, 20 Conn. 23; Stiles v. Shumway, 16 Vt. 435.

owner, and there is no actual and exclusive possession of the personal property by the vendee, the personal property on the land will be deemed to be in their joint possession.[1] But where the vendee has a visible and notorious possession, a surrender of a lease will enable him to obtain a valid title, although the vendor remains on the land.[2] Taking a lease is some evidence of a change of possession,[3] but not sufficient.[4] In such case there must be some change in the mode and manner of occupying the premises. Upon a sale of wheat in the ground, the vendee may, however, lease the farm and employ the vendor as his agent.[5] Possession need not be taken of a windmill attached to the land, when both the land and the windmill are conveyed by a mortgage.[6] The constructive possession of the land is sufficient possession of the mill. A principal may make a purchase from an agent who manages his farm, if the transaction is open and not calculated to give the vendor a false credit, and leave the goods upon the farm under the management of the vendor,[7] but secrecy will vitiate such a transaction.[8] When an agent sells goods to his principal which are already upon the principal's land, there need be no other change of possession, for the law will refer the possession to the principal in whom the property now is, and in whom the possession apparently was before.[9] Where the vendee owns a farm, and goes to live with the

[1] Flanagan v. Wood, 33 Vt. 332.

[2] Talcott v. Wilcox, 7 Conn. 134.

[3] Conway v. Edwards, 6 Nev. 190.

[4] Flanagan v. Woods, 33 Vt. 332; Grum v. Barney, 55 Cal. 254.

[5] Herron v. Fry, 2 Penna. 263.

[6] Steward v. Lombe, 1 Brod. & B. 506.

[7] Lewis v. Whittemore, 5 N. H. 364; Wright v. Grover, 27 Ill. 426; Visher v. Webster, 13 Cal. 58.

[8] Trask v. Bowers, 4 N. H. 309; Stephens v. Barnett, 7 Dana, 257.

[9] Manton v. Moore, 7 T. R. 67.

vendor upon it, and the vendor works it upon shares, and has the sole conduct of the business, the change is not sufficient;[1] but the vendee may purchase land, and the personal property upon it, and employ the vendor as overseer,[2] or as agent,[3] if he assumes an exclusive control of the property. So, also, if the vendor absconds, the fact that the vendor's family remains in the house is immaterial, when the vendee exercises acts of dominion over the personal property.[4] If the vendee owns the house in which the goods are, and has the control and management of the household, without any intermeddling on the part of the vendor, the fact that the vendor lives with the vendee will not make the transfer void.[5] A party who engages another to manufacture articles for him on his own premises, has sufficient possession of them as soon as they are manufactured.[6] A steam-engine may be left on the premises, in the charge of an agent, and used by the vendee.[7] A man may have the exclusive possession of personal property which is upon land occupied by him and the vendor in common.[8] If the vendee owns the land,[9] or leases the house[10] where the property is placed, it is sufficient if the vendor removes from it. But a removal of the vendor with the property to a hotel kept by the vendee is not sufficient.[11] Wherever the constructive possession of land has been considered of any importance, there have been

[1] Mills v. Warner, 19 Vt. 609. [2] Wilson v. Lott, 5 Fla. 305.
[3] Wilson v. Hooper, 12 Vt. 653. [4] Burrows v. Stebbins, 26 Vt. 659.
[5] Ludlow v. Hurd, 19 Johns. 218; Wilson v. Lott, 5 Fla. 305.
[6] Partridge v. Wooding, 44 Conn. 277.
[7] Funk v. Staats, 24 Ill. 632.
[8] Potter v. Mather, 24 Conn. 551; *vide* Hoffner v. Clark, 5 Whart. 545; Brawn v. Keller, 43 Penn. 104; s. c. 3 Grant, 237.
[9] Pacheco v. Hunsacker, 14 Cal. 120; Sharon v. Shaw, 2 Nev. 289.
[10] Barr v. Reitz, 53 Penn. 256.
[11] Myers v. Woods, 1 Phila. 24.

both delivery and acts of dominion over the property upon it.

WHERE THE RULE DOES NOT APPLY.—The rule does not apply to sales of property which is exempt from execution,[1] or to sales of partnership property, as against the creditors of one of the partners, because they can not levy upon the partnership property.[2] Upon the purchase of the equity of redemption, only so much of the right as was absolute can be deemed fraudulent, and upon declaring it alone void, the mortgagee is remitted to his pre-existent rights under the mortgage.[3]

EXCHANGES.—When an exchange is made by the vendor, without the concurrence of or consultation with the vendee, no distinction can be allowed between the article received and the one for which it is substituted.[4] But if the vendee makes the exchange, the possession of the vendor will not render the property liable to his creditors although the vendee makes the exchange through the vendor as his agent.[5] If the property is converted into money, and the money is actually received by the vendee, this ends the question in regard to the delivery. The vendee may then take the money and purchase other property, and leave that with the first vendor. There is then no connection between this property and any other property which the vendor may have had, and creditors

[1] Anthony v. Wade, 1 Bush. 110; Morton v. Ragan, 5 Bush. 334; Foster v. McGregor, 11 Vt. 595; Patten v. Smith, 5 Conn. 196; s. c. 4 Conn. 450.

[2] Page v. Carpenter, 10 N. H. 77; Criley v. Vasel, 52 Mo. 445.

[3] Daniel v. Morrison, 6 Dana, 182; s. c. 6 J. J. Marsh. 398. *Contra*, Clayborn v. Hill, 1 Wash. (Va.) 177.

[4] Mills v. Warner, 19 Vt. 609.

[5] Lucas v. Birdsey, 41 Conn. 357; Capron v. Porter, 43 Conn. 283.

are put at once upon inquiry as to the origin of the title.[1] The rule does, however, apply to the chattel's offspring.[2]

Possession by Feme Covert.—The possession of the wife is the possession of the husband,[3] but there is no case where the possession of the husband after marriage of property conveyed by the wife before marriage has been held inconsistent with the deed of the wife, where that deed was absolute on its face, and without any special stipulation, limitation, or reservation.[4] The possession to be conclusive evidence of fraud must be ostensibly either actual or usufructuary, that is, it must be a possession in fact by the debtor or under him, or apparently to his use, such a possession as would be a badge of property, and might therefore give a delusive credit. Although, after a separation, *a mensa*, the possession by the wife *de jure* of her own property or that of her husband may be his possession for many legal purposes, nevertheless her actual or beneficial possession of the property of a benevolent stranger or friend is not, either in fact or in law, the possession of her husband in any sense or for any purpose. The constructive possession follows the title, and the law presumes the possession to be in the owner, and not in the absent husband, whose only right even to the use is founded on the technical fiction of the identity in law of husband and wife, or on the mere legal power, still conceded to him by the common law, over his wife and over the use of property in her possession.[5] When there is no proof that the property in the possession of the husband is

[1] Ridout v. Burton, 27 Vt. 383. [2] Mott v. McNeil, 1 Aik. 162.
[3] King v. Bailey, 6 Mo. 575.
[4] Land v. Jeffries, 5 Rand. 599, 211; Prior v. Kinney, 6 Munf. 510.
[5] Chiles v. Bernard, 3 Dana, 95; Leonard v. Baker, 1 M. & S. 251.

an acquisition from the wife's own money or property, it belongs to the husband.[1]

Sufficiency of Change varies with Each Case.— What constitutes a sufficient change of possession must be a question which will vary with circumstances, and what may have been said by the courts on this subject should be taken with reference to the case then before them, in relation to the character and situation of the property at the time of the sale.[2] When the goods are in the possession of the vendee, there need be no formal delivery of the possession.[3] It makes no difference whether the property is removed from the owner, or the owner from the property. It is not the mere place the property occupies which gives color of possession to the former owner, but it is the connection the place itself has with the former owner indicating his apparent control over it.[4] An immediate delivery, and an actual and continued change of possession, are consistent with the retention of the property on the same premises. Removal is an evidence, and a strong one, of that change, but not the indispensable evidence. The exercise of ownership and control by the vendee, and, above all, the absence of any such control by the vendor, are the true test by which to decide the validity of the transfer. The change must be notorious, and the possession and control of the vendee indisputable. The goods may be left on the premises, in the exclusive charge of an agent.[5] Where the vendee buys the furniture of a hotel,

[1] Milne v. Henry, 40 Penn. 352. [2] Hutchins v. Gilchrist, 23 Vt. 82.

[3] Lake v. Morris, 30 Conn. 201; Manton v. Moore, 7 T. R. 67.

[4] Barr v. Reitz, 53 Penn. 256; Craver v. Miller, 65 Penn. 456; Pacheco v. Hunsacker, 14 Cal. 120.

[5] Hutchins v. Gilchrist, 23 Vt. 82; Cartwright v. Phœnix, 7 Cal. 281; Lee v. Huntoon, 1 Hoffm. Ch. 447; Funk v. Staats, 24 Ill. 632.

it is not sufficient for him to move to the hotel if the business is managed by the vendor the same as before.[1] Even a removal is not sufficient, when the vendor accompanies the goods.[2] The property must either pass out of the vendor to the vendee, or the vendor must pass away from them, leaving them in the exclusive possession of the vendee.

PREVIOUS OWNERSHIP.—It is no excuse that the mortgagee sold the goods to the mortgagor and took a mortgage as a security for the purchase money.[3] The period of the debtor's previous ownership is not permitted to qualify the rule; whether for a longer or shorter time, it induces the same legal consequences. But the case of bailment to one who has never been owner is not within the rule, although he may, prior to the bailment, have made a contract to purchase, upon his failure to comply with which the bailor purchased.[4]

NOTICE.—If a creditor consents that the vendor shall remain in possession, he can not claim that the sale is fraudulent on this account alone,[5] but mere notice is not sufficient;[6] nor can a sheriff be prejudiced by any

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[1] Myers v. Woods, 1 Phila. 24.

[2] Weil v. Paul, 22 Cal. 492; Garman v. Cooper, 72 Penn. 32.

[3] Woodward v. Gates, 9 Vt. 358. In Meggott v. Mills, 1 Ld. Raym. 286; 12 Mod. 159, money was loaned to purchase goods, and a bill of sale taken as security, and the transfer was held valid. The same doctrine is laid down in Buller's N. P. 258. But it is said not to be law in Clow v. Woods, 5 S. & R. 275.

[4] Spring v. Chipman, 6 Vt. 662. [5] Steel v. Brown, 1 Taunt. 381.

[6] Hower v. Geesaman, 17 S. & R. 251; Stark v. Ward, 3 Penn. 328; King v. Bailey, 6 Mo. 575; Lassiter v. Busey, 14 La. An. 699; Lawrence v. Burnham, 4 Nev. 361; Swift v. Thompson, 9 Conn. 63; Miller v. Garman, 2 Pearson, 91. *Contra*, Wooderman v. Baldock, 8 Taunt. 676; Ludwig v. Fuller, 17 Me. 162.

knowledge of the judgment creditor.[1] Knowledge that there is a separate defeasance to an absolute deed makes no difference, for what is void may be taken advantage of by all creditors.[2]

NOMINAL PARTY.—If the vendor is a mere trustee or nominal party, holding the title for the use of another, and sells absolutely the thing thus held, while it is in the possession of the beneficiary, the sale will be fraudulent, unless the possession is changed and conforms to the contract.[3] Where a sale is made by a person who has no title to the goods, with the assent and for the benefit of the real owner, the same principles will be applied as if the beneficiary were the nominal vendor. The rule would be of no avail if its application could be evaded by the introduction of a third person as nominal vendor, while the possession remains with the beneficial owner.[4]

BY OWNER TO DEBTOR.—It has never yet been held that a person may not give the possession of his goods to another. Putting a man into possession of goods, when they were not originally his, does not make them a fund for the payment of his debts.[5] The rule is limited to transfers by debtors. It has no application to transfer to debtors. There are certain necessary and lawful contracts, by which the owner parts with the possession, and yet fraud can not be presumed. Such are the contracts of lending and hiring, both very useful, and without which

[1] Meeker v. Wilson, 1 Gall. 419; Hower v. Geesaman, 17 S. & R. 251. *Contra*, Ludwig v. Fuller, 17 Me. 162.

[2] Gaither v. Mumford, 1 N. C. T. R. 167.

[3] Breckinridge v. Anderson, 3 J. J. Marsh. 710.

[4] Laughlin v. Ferguson, 6 Dana, 111.

[5] Dawson v. Wood, 3 Taunt. 256; Craig v. Ward, 9 Johns. 197; Howard v. Sheldon, 11 Paige, 558; Clinn v. Russell, 3 Blackf. 772.

society could not well exist. It is of the essence of these that the owner should give up the possession for a time. Such, too, are contracts by which an artizan or manufacturer has the possession of materials belonging to another, for the purpose of making them up or repairing them for the owner. No suspicion of fraud can fairly arise where the transaction is in the usual course of business.[1]

CONDITIONAL SALE.—A stipulation that the title shall not pass to the vendee is not fraudulent, whether verbal[2] or in writing,[3] and the vendee's creditors can not seize the property until the condition precedent is performed.[4] A third person may purchase the interests of the vendor and conditional vendee, and leave the property in the possession of such conditional vendee.[5] Goods may also be placed in the hands of an insolvent debtor, to sell in his own name and account for the proceeds, with a condition that the title shall not vest in him until they are paid for.[6] In this mode creditors are put to a great disadvantage, there being no title in the debtor of which they can avail themselves at law, even if the greater part of the consideration has been paid. This renders such contracts objects of jealousy, and they certainly ought to be criti-

[1] Martin v. Mathiot, 14 S. & R. 214; Ayer v. Bartlett, 23 Mass. 71; Peters v. Smith, 42 Ill. 417.

[2] Reeves v. Harris, 1 Bailey, 563; Baylor v. Smithers' Heirs, 1 Litt. 105; Hussey v. Thornton, 4 Mass. 405; Armington v. Houston, 38 Vt. 448; Bigelow v. Huntley, 8 Vt. 151; Myers v. Harvey, 2 Penna. 478. *Contra*, Ketchum v. Watson, 24 Ill. 592; Martin v. Mathiot, 14 S. & R. 214; Thompson v. Paret, 94 Penn. 275.

[3] Dupree v. Harrington, Harp. 391; Ayer v. Bartlett, 23 Mass. 71; Bradley v. Arnold, 16 Vt. 382; Paris v. Vail, 18 Vt. 277.

[4] Barrett v. Pritchard, 19 Mass. 512; Marston v. Baldwin, 17 Mass. 606; Bigelow v. Huntley, 8 Vt. 151; Buckmaster v. Smith, 22 Vt. 203.

[5] Smith v. Foster, 18 Vt. 182.

[6] Merrill v. Rinker, 1 Bald. 528; Blood v. Palmer, 11 Me. 414; Chaffee v. Sherman, 26 Vt. 237.

cally scrutinized, for they afford a most convenient screen for fraud between the parties to the bargain. But they are not *per se* fraudulent. It is not sufficient merely for the vendor to deliver the goods to the vendee, and permit him to have them in such a manner as to induce others to give him a false credit. If the vendor does this with a fraudulent design to obtain credit for the vendee, without doubt the creditors would hold the property; but if he does nothing more than endeavor to keep the security in his own hands, he will not be prejudiced, although creditors may have been deceived by the circumstances. The true question is, whether the transaction is *bona fide* or fraudulent. If the transaction is fraudulent, the vendor setting up a condition to the sale, yet suffering the vendee to be in possession but exercising full rights over the property, with the intent and purpose of enabling him to obtain credit on the strength of the property, he will not be able to avail himself of such condition, but the sale will be held to be absolute in regard to the creditors. But if *bona fide*, and the object of the condition is merely security to the vendor, he will not lose his property merely because some creditor of the vendee supposes it belongs to the vendee.[1]

Question of Law.—There are some instances in which no change of possession is necessary, but they are special cases, and for special reasons to be shown to and approved of by the court.[2] Delivery of possession is deemed to be

[1] Ayer v. Bartlett, 23 Mass. 71; Merrill v. Rinker, 1 Bald. 528.

[2] Sturtevant v. Ballard, 9 Johns. 337; Clow v. Woods, 5 S. & R. 275; Williams v. Lowndes, 1 Hall, 579; Divver v. McLaughlin, 2 Wend. 596; Doane v. Eddy, 16 Wend. 523; Collins v. Brush, 9 Wend. 198; Randall v. Cook, 17 Wend. 53; Coburn v. Pickering, 3 N. H. 415; Wooderman v. Baldock, 8 Taunt. 676; Patten v. Smith, 5 Conn. 196; s. c. 4 Conn. 450;

so much of the essence of the sale of chattels, that an agreement to permit the vendor to keep possession is an extraordinary exception to the usual course of dealing, and requires a satisfactory explanation. There must be some sufficient motive, of which the court is to judge, for the non-delivery of the goods, or the rule presumes it to be made with a view to delay, hinder or defraud creditors.[1] It is necessary that the retention of the possession shall appear to be for a purpose fair, honest and absolutely necessary, or at least essentially conducive to some fair object the parties have in view, and which constitutes the motive for entering into the contract. It is necessary not only that appearances shall agree with the real state of things, but also that the real state of things shall be honest and consistent with public policy, and that it shall afford no unnecessary facility to deception.[2]

When Vendor and Vendee Reside Together.—The fact that the vendor and vendee reside together,[3] board together in the same house,[4] or live together in the house upon the lot where the stable is which they use in common,[5] does not take the case out of the operation of the

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Beekman v. Bond, 19 Wend. 444; Randall v. Parker, 3 Sandf. 69; Swift v. Thompson, 9 Conn. 63; Osborne v. Tuller, 14 Conn. 529; Carter v. Watkins, 14 Conn. 240; Stevens v. Fisher, 19 Wend. 181; Hundley v. Webb, 3 J. J. Marsh. 643; Gibson v. Love, 4 Fla. 217; Mauldin v. Mitchell, 14 Ala. 814; Millard v. Hall, 24 Ala. 209. The practice in Connecticut differs slightly from that of the other States. Swift v. Thompson, 9 Conn. 63.

[1] Sturtevant v. Ballard, 9 Johns. 337.

[2] Clow v. Woods, 5 S. & R. 275.

[3] Jarvis v. Davis, 14 B. Mon. 529; Waller v. Cralle, 8 B. Mon. 11; Steelwagon v. Jeffries, 44 Penn. 407; Stiles v. Shumway, 16 Vt. 435; Hull v. Sigsworth, 48 Conn. 258.

[4] Hoffner v. Clark, 5 Whart. 545.

[5] Brawn v. Keller, 43 Penn. 104; s. c. 3 Grant, 237.

rule. Even occasional acts of ownership will not constitute a legal possession in the vendee if the goods are in the same situation as before.[1] But in such case the change need be only such as can reasonably be expected in view of the character and situation of the property and the relation of the parties.[2] There is a distinction, however, to be made between cases where the donor and donee live apart, and those where they necessarily live together. In the case of a father and child who, from their connection, must live together at least until the child comes of age, it would have the effect of destroying all gifts to say that the possession must be considered that of the father.[3] A sister-in-law is not within this exception.[4] If a son's possession and use of the goods are exclusive, a sale will be valid although his father may live with him. If mere cohabitation were a badge of fraud, a father's sale to his unmarried son would seldom be sustained.[5]

MERE CONVENIENCE.—Where possession has been withheld pursuant to the terms of an agreement, some good reason for the arrangement beyond the mere convenience of the parties must appear.[6] Goods cannot be retained for

[1] Mott v. McNiel, 1 Aik. 162; Stiles v. Shumway, 16 Vt. 435.

[2] Evans v. Scott, 89 Penn. 136.

[3] Curry v. Ellerbe, 1 Bailey, 578; Kid v. Mitchell, 1 N. & M. 334; Jacks v. Tunno, 3 Dessau. 1; Smith v. Littlejohn, 2 McCord, 362; Howard v. Williams, 1 Bailey, 575; Braxton v. Gaines, 4 H. & M. 151; Wash v. Medley, 1 Dana, 269; Enders v. Williams, 1 Met. (Ky.) 346; Dodd v. McCraw, 8 Ark. 83; Humphries v. McCraw, 9 Ark. 91; Danley v. Rector, 10 Ark. 211; Clayton v. Brown, 17 Geo. 217; Goodwyn v. Goodwyn, 20 Geo. 600. *Contra*, Stiles v. Shumway, 16 Vt. 435.

[4] Smith v. Henry, 2 Bailey, 118; S. C. 1 Hill, 16.

[5] McVicker v. May, 3 Penn. 224; Braxton v. Gaines, 4 H. & M. 151.

[6] Clow v. Woods, 5 S. & R. 275; Jennings v. Carter, 2 Wend. 446; Crouch v. Carrier, 16 Conn. 505; Gardner v. Adams, 12 Wend. 297; Doane v. Eddy, 16 Wend. 523; Randall v. Cook, 17 Wend. 53.

the purpose of being manufactured,[1] or to complete a process of manufacture in progress at the time of the sale,[2] or under a covenant to keep and deliver at a future day,[3] or upon a conditional sale,[4] or from motives of benevolence on the part of the vendee.[5] An agreement on the part of the vendor to pay for the use of the goods will not repel the imputation of fraud.[6]

CONSISTENT WITH TITLE, NOT TERMS OF DEED.—The possession must be compatible with the title and not the terms of the instrument by which the transfer is made. Unless the contract of sale is conditional, or in trust, the possession should correspond with the title; and if the sale is unconditional and passes the absolute right of property from the vendor to the vendee, no reservation of the possession to the vendor in the written evidence of the sale will exempt the transaction from the imputation of fraud, in law, upon the rights of the creditors of the vendor.[7] But there is an essential difference between the effect of a possession retained by the maker of an absolute bill of sale and the possession retained by the maker of a mortgage. The object of the one is to pass the absolute

[1] Carter v. Watkins, 14 Conn. 240; Pritchett v. Jones, 4 Rawle, 260; Hall v. Gaylor, 37 Conn. 550. *Contra*, Clow v. Woods, 5 S. & R. 275.

[2] Pritchett v. Jones, 4 Rawle, 260.

[3] Brummel v. Stockton, 3 Dana, 134; Hundley v. Webb, 3 J. J. Marsh. 643; Grimes v. Davis, 1 Litt. 241; Millard v. Hall, 24 Ala. 209.

[4] Laughlin v. Ferguson, 6 Dana, 111.

[5] Mauldin v. Mitchell, 14 Ala. 814.

[6] Coburn v. Pickering, 3 N. H. 415; Streeper v. Eckhardt, 2 Whart. 302; Norton v. Doolittle, 33 Conn. 405; Goldsbury v. May, 1 Litt. 254; Laughlin v. Ferguson, 6 Dana, 111; Webster v. Peck, 31 Conn. 495; Paul v. Crooker, 8 N. H. 288. *Contra*, Sydnor v. Gee, 4 Leigh, 535; Powers v. Green, 14 Ill. 386; Cunningham v. Hamilton, 25 Ill. 228; Pringle v. Rhame, 10 Rich. 72; Jones v. Blake, 2 Hill Ch. 629; Upson v. Raiford, 29 Ala. 188; Wheeler v. Train, 20 Mass. 254.

[7] Hundley v. Webb, 3 J. J. Marsh. 643.

right of property, and the object of the other is to give a security defeasible upon a particular contingency; the possession in the former case is utterly incompatible with the deed, whereas in the latter case there exists no such incompatibility.[1] Where by the terms of the conveyance the vendee is not to have possession until the performance or non-performance of a certain condition, there the vendor's continuing in possession is no evidence of fraud, because it is consistent with the trust appearing on the face of the deed, and is not to be presumed to give a false credit to the vendor.[2] In case of mortgages, the possession of the mortgagor is not inconsistent with the terms of the contract and the nature of the transaction, for before condition broken it is uncertain whether the property will vest absolutely in the mortgagee or not, and nothing is more common than to suffer the mortgagor to retain possession until this may be ascertained. Stipulations to this effect are often inserted in mortgage deeds.[3] It is for this reason that the retention of possession under a mortgage is not deemed in the judgment of the law to be fraudulent.[4]

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[1] Merrill v. Dawson, 1 Hemp. 563; s. c. 11 How. 373.

[2] Badlam v. Tucker. 18 Mass. 389.

[3] Holmes v. Crane, 19 Mass. 607.

[4] Stone v. Grubbam, 2 Bulst. 217; s. c. 1 Rol. Rep. 3; Martindale v. Booth, 3 B. & A. 498; Reed v. Wilmot, 7 Bing. 577; s. c. 5 M. & P. 553; Conard v. Atlantic Ins. Co., 1 Pet. 386; Barrow v. Paxton, 5 Johns. 258; Adams v. Wheeler, 27 Mass. 199; Marsh v. Lawrence, 4 Cow. 461; Ash v. Savage, 5 N. H. 545; Holbrook v. Baker, 5 Me. 309; Ward v. Sumner, 22 Mass. 59; DeWolfe v. Harris, 4 Mason, 515; s. c. 4 Pet. 147; Brinley v. Spring, 7 Me. 241; Clayborn v. Hill, 1 Wash. (Va.) 177; Hundley v. Webb, 3 J. J. Marsh. 643; McGowen v. Hoy, 5 Litt. 239; Watson v. Williams, 4 Blackf. 26; Thornton v. Davenport, 2 Ill. 296; Rose v. Burgess, 10 Leigh, 186; U. S. v. Hooe, 3 Cranch, 73; Snyder v. Hitt, 2 Dana, 204; Merrill v. Dawson, 1 Hemp. 563; s. c. 11 How. 375; Fairbanks v. Bloomfield, 5 Duer, 434; Runyon v. Groshon, 12 N. J. Eq. 86; Wilson v. Russell, 13 Md. 494. *Contra*, Doak v. Brubacker, 1 Nev. 218; Meyer v.

The condition, however, must be in the title, and not simply in the contract. The title must depend on condition, and be such as may be considered legal and reasonable.[1] When the deed stipulates that the debtor may remain in possession until default in payment of any or all of the instalments, possession until default in payment of all the instalments is consistent with the deed.[2]

STIPULATION IN MORTGAGE.—Anciently it was usual to insert a clause in the mortgage that the mortgagor should retain possession until default, but the understanding and practice now is that the mortgagor remains in possession until default is made unless there is a contract to the contrary.[3] When a stipulation is inserted in the deed, the possession must be consistent with it. If the deed stipulates that the mortgagee shall have the possession, the possession of the mortgagor is fraudulent.[4] The deed may contain a stipulation that the grantor shall receive the rents and profits until the grantee shall become entitled to demand the money which the deed is intended to secure.[5] A separate defeasance, instead of making the vendor's

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Gorham, 5 Cal. 322; The Romp, Olcott, 196; Sibly v. Hood, 3 Mo. 290; Tobias v. Francis, 3 Vt. 425; Woodward v. Gates, 9 Vt. 358; Clow v. Woods, 5 S. & R. 275; Welsh v. Bekey, 1 Penna. 57; Doane v. Eddy, 16 Wend. 523; Randall v. Cook, 17 Wend. 53; Swift v. Thompson, 9 Conn. 63; Case v. Winship, 4 Blackf. 425; King v. Bailey, 6 Mo. 575; Gist v. Pressley, 2 Hill Ch. 318; Reeves v. Harris, 1 Bailey, 563; Gaylor v. Harding, 37 Conn. 508. When the stipulation is that the mortgagor shall have possession, it is void though the possession is with the mortgagee. Meyer v. Gorham, 5 Cal. 322.

[1] Hundley v. Webb, 3 J. J. Marsh. 643.

[2] Martindale v. Booth, 3 B. & A. 498; Magee v. Carpenter, 4 Ala. 469.

[3] Watson v. Williams, 4 Blackf. 26; Gist v. Pressley, 2 Hill Ch. 318; Maney v. Killough, 7 Yerg. 440.

[4] Jordan v. Turner, 3 Blackf. 309; Kitchell v. Bratton, 2 Ill. 300.

[5] U. S. v. Hooe, 3 Cranch, 73.

possession consistent with his deed, and thereby fair, evinces his guilt by making it more difficult to detect the fraud. It is a cover to a foul transaction, and not the evidence of a fair one. Even if the parties intend to make a mortgage, the form of the deed tells a falsehood to the world, the truth only remaining to themselves. It is too late to disclose the truth after the injury arising from the secrecy has been sustained.[1]

Fraud in Fact.—The rule does not declare that in conditional sales the retention of possession by the vendor may not be fraudulent, but that, as a general rule, it is not necessarily so.[2] Deeds of trust are subject to the same principles as mortgages.[3]

Condition Broken.—Possession after the condition is broken is not fraudulent, for when a conveyance is not fraudulent at the time of the making of it, it cannot be made fraudulent by any subsequent matter.[4] If the mortgagee fails to take possession immediately upon default, it cannot be assumed as a conclusion of law that the mort-

[1] Gaither v. Mumford, 1 N. C. T. R. 167; Laughlin v. Ferguson, 6 Dana, 111. *Contra*, Holmes v. Crane, 19 Mass. 607; Bartlett v. Williams, 18 Mass. 288; Sydnor v. Gee, 4 Leigh, 535.

[2] Hundley v. Webb, 6 J. J. Marsh. 643.

[3] Head v. Ward, 1 J. J. Marsh. 280; Ravisies v. Alston, 5 Ala. 297; Johnson v. Cunningham, 1 Ala. 249; Malone v. Hamilton, Minor, 286; Hopkins v. Scott, 20 Ala. 179.

[4] Lady Lambert's Case, Shep. Touch. 65; Weaver v. Joule, 91 E. C. L. 309; s. c. 3 C. B. (N. S.) 309; DeWolf v. Harris, 4 Mason, 515; s. c. 4 Pet. 147; Head v. Ward, 1 J. J. Marsh. 280; Maples v. Maples, Rice Ch. 300; Gist v. Pressley, 2 Hill Ch. 318; Simerson v. Bank, 12 Ala. 205; Planters' Bank v. Willis, 5 Ala. 770; Dearing v. Watkins, 16 Ala. 20; Merrill v. Dawson, 1 Hemp. 563; s. c. 11 How. 375; Feurt v. Powell, 62 Mo. 524. *Contra*, Armstrong v. Baldock, Gow. 33; Reed v. Eames, 19 Ill. 594; Cass v. Perkins, 23 Ill. 382; Hanford v. Obrecht, 49 Ill. 146; Rhines v. Phelps, 8 Ill. 455. No general rule can be established, but the

gage is fraudulent. If the transaction is fair in its inception, it cannot be denounced because the mortgagee does not avail himself of his rights *stricti juris*. The retention of possession by the mortgagor for an unreasonable length of time may warrant the inference that the mortgage is held up as a protection for his property against the demands of his creditors. But this is a conclusion which may be repelled by proof that the indulgence of the mortgagee is compatible with fair dealing, and induced by no intention to favor the mortgagor to the prejudice of creditors. It must, from the very nature of the case, be a question of fact for the solution of the jury.[1] Upon the extinguishment of the mortgage by the purchase of the equity of redemption, the possession should be changed; but the retention will make only the purchase of the equity of redemption void, and the mortgage will be valid.[2]

MARRIAGE SETTLEMENTS.—The retention of possession under a marriage settlement, whether antenuptial[3] or postnuptial,[4] and whether of the husband's property[5] or the wife's,[6] is consistent with the deed, and does not render the settlement void. The wife's possession is considered

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mortgagee must act with promptness, and must use every reasonable effort to reduce the property into his immediate possession after a default of payment or other condition broken, by which he becomes entitled to possession (Cass v. Perkins, 23 Ill. 382).

[1] Planters' Bank v. Willis, 5 Ala. 770.

[2] Laughlin v. Ferguson, 6 Dana, 111. *Contra*, Clayborn v. Hill, 1 Wash. (Va.) 177; Glasscock v. Batton, 6 Rand. 78.

[3] Cadogan v. Kennett, Cowp. 432; Cochran v. McBeath, 1 Del. Ch. 187.

[4] Arundel v. Phipps, 10 Ves. 139; Charlton v. Gardner, 11 Leigh, 281; Waller v. Todd, 3 Dana, 503; Larkin v. McMullin, 49 Penn. 29.

[5] Cadogan v. Kennett, Cowp. 432; Cochran v. McBeath, 1 Del. Ch. 187.

[6] Jarman v. Woolloton, 3 T. R. 618; Hazelinton v. Gill, 3 T. R. 620, note; 3 Doug. 415.

as the possession of the trustee, and not of the husband.[1] The fact that goods held by a trustee as the separate property of the wife have been in the possession of her husband for a considerable time makes no difference as to the right of the trustee to dispose of them, or to recover the value if tortiously taken by or in behalf of a creditor of the husband. It is difficult to see how the wife could enjoy the avails of the property without his participation, so long as they reside together. Indeed, she may expressly authorize him to use or enjoy her property without giving it to him, and his creditors can not complain, as they will lose nothing by the transaction. The possession of the property by the husband, if not inconsistent with the nature of the trust, is not considered as fraudulent.[2]

PURCHASES.—The interest is as much separate property as the principal, and purchases made with it are hers and subject to the same rules as the principal fund,[3] and her possession is the possession of the trustee, and not the possession of her husband.[4] By the common law the husband owns his wife's property. Consequently, if the income from the separate estate is delivered to her, either with the intent that it shall belong to her, or without any agreement that it shall still continue to be a part of the separate estate, purchases made with it will be liable to the husband's creditors.[5] There may be facts which might warrant the inference that the goods have been purchased by the husband with his own funds, and that he has resorted to the pretext that they are a part of his

[1] Jarman v. Woolloton, 3 T. R. 618.
[2] Merritt v. Lyon, 3 Barb. 110. [3] Merritt v. Lyon, 3 Barb. 110.
[4] Danforth v. Woods, 11 Paige, 9.
[5] Shirley v. Shirley, 9 Paige, 363; Carne v. Brice, 7 M. & W. 183.

wife's separate estate to protect them from the search of his creditors. These are subjects proper for the consideration of the jury.[1] The trustee for the wife may purchase the husband's goods at a sale under an execution, and leave them in the possession of the wife, although she resides with her husband.[2]

PUBLIC SALE.—The notoriety of the change of possession will, in some instances, repel the presumption of fraud.[3] The mere seizure of goods on an execution is not sufficient. A person can not, then, pay the judgment, take a bill of sale as security, and leave the goods in the possession of the debtor.[4] But, after a sale at public auction under a deed of trust, the purchaser may permit the debtor to keep the goods.[5] After a sale under a distress for rent, the goods may be left in the possession of the tenant.[6] The same principle applies to a sale upon the foreclosure of a mortgage.[7]

SALE UNDER EXECUTION.—The retention of possession after a sale under an execution rests upon even stronger

[1] Merritt v. Lyon, 3 Barb. 110.

[2] Quick v. Garrison, 10 Wend. 335; Cross v. Glode, 2 Esp. 574.

[3] Ryall v. Rolle, 1 Ves. 348; s. c. 1 Atk. 165; 1 Wils. 260; Armstrong v. Baldock, Gow. 33.

[4] Weil v. Paul, 22 Cal. 492; Laughlin v. Ferguson, 6 Dana, 111; Leech v. Shantz, 2 Phila. 310; s. c. 5 A. L. Reg. 620; Weeks v. Wead, 2 Aik. 64. *Contra*, Jezeph v. Ingram, 8 Taunt. 838; s. c. 1 Moore, 189.

[5] Leonard v. Baker, 1 M. & S. 251; Fitler v. Maitland, 5 W. & S. 307; Dallam v. Fitler, 6 W. & S. 323; Woodham v. Baldock, Gow. 35, note; s. c. 3 Moore, 11; Gutzweiler v. Lachman, 28 Mo. 434; Ravisies v. Alston, 5 Ala. 297; Bank v. McDade, 4 Port. 252. *Contra*, Rogers v. Vail, 16 Vt. 327; Thompson v. Yeck, 21 Ill. 73.

[6] Guthrie v. Wood, 1 Stark, N. P. 367; Waters v. McClellan, 4 Dall. 208; Greathouse v. Brown, 5 Mon. 280.

[7] Hanford v. Obrecht, 49 Ill. 146; Clayton v. Anthony, 6 Rand. 285; Simerson v. Bank, 12 Ala. 205.

grounds. A distinction is established between a sale made by the vendor or his individual agent, which, in the absence of a physical coercion, is properly a voluntary as well as a private sale, and one made under a legal mandate and by an officer of the law, and which is therefore properly a coercive sale. And it is because a sale of the latter class is made under command of the law, and not under the mere will of the owner—by the act of the law through its officer, and not by the individual act of the party or his agent—and with that fairness and publicity which the law requires and expects from its officer, and not merely before such witnesses as the owner may provide, that the law so far confides in it as not to pronounce it conclusively void upon the mere fact that the possession remains with the former owner.[1] The principle applies to sales by commissioners[2] as well as constables.[3] It is immaterial whether the purchase is made by a stranger[4] or the execution creditor.[5] The advertisements may be given to the debtor to post, and the pur-

[1] Laughlin v. Ferguson, 6 Dana, 111; Gates v. Gaines, 10 Vt. 346; Cole v. Davies, 1 Ld. Raym. 724; Myers v. Harvey, 2 Penn. 478; Perry v. Foster, 3 Harring. 293; Allenton Bank v. Beck, 49 Penn. 394; McInstry v. Tanner, 9 Johns. 135; Floyd v. Goodwin, 8 Yerg. 484; Bates v. Carter, 5 Vt. 602; Brandon v. Cunningham, 2 Stew. 249; Anderson v. Brooks, 11 Ala. 953; Coleman v. Bank, 2 Strobh. Eq. 285; Pennington v. Chandler, 5 Harring. 394; Dick v. Lindsay, 2 Grant, 431; Miles v. Edelen, 1 Duvall, 270; Craig's Appeal, 77 Penn. 448; Magnes v. Atwater, 88 Penn. 496.

[2] Miles v. Edelen, 1 Duvall, 270.

[3] Pennington v. Chandler, 5 Harring. 394; Perry v. Foster, 3 Harring. 293.

[4] Kidd v. Rawlinson, 2 B. & P. 59; s. c. 3 Esp. 52; Watkins v. Birch, 4 Taunt. 823; Latimer v. Batson, 4 B. & C. 652; Garrett v. Rhame, 9 Rich. 407; Boardman v. Keeler, 1 Aik. 158.

[5] Simerson v. Bank, 12 Ala. 205; Watkins v. Birch, 4 Taunt. 823; Boardman v. Keeler, 1 Aik. 158; Allentown Bank v. Beck, 49 Penn. 394; Gates v. Gaines, 10 Vt. 346.

chase may be for a low price.[1] The payment of rent for the use of the goods makes a stronger case than if the purchaser permits them to remain in the debtor's custody without any consideration.[2] The goods may be left in the possession of the debtor upon condition that he shall pay the money to the purchaser as he shall raise it by a sale of them.[3] Goods sold under an execution may be conveyed to a trustee for the sole and separate use of the debtor's wife.[4] It is not sufficient that the sale is made at auction by the sheriff. The sale by the sheriff must be upon legal process, and not under an agreement where any other person might as well have been agreed upon as he.[5]

MERE AGREEMENT.—If the sale is in fact made by the private agreement or understanding of the parties, and not by the coercion of the law, as under an execution which has been satisfied, it partakes of the character of a private sale, and is subject to those rules of law in relation to possession which are applied to private sales. The intervention and abuse of the process of the court can not change the aspect of the case.[6] So also, although a sale under a trust deed has been advertised, yet if the trustee is away on the day of sale, and the debtor and *cestui que trust* enter into an arrangement by which the latter sells the property at public auction, it will be regarded as substantially a sale by the debtor with the concurrence of the trust creditor.[7] This doctrine in regard to the publicity

[1] Allentown Bank v. Beck, 49 Penn. 394.

[2] Watkins v. Birch, 4 Taunt. 823; Myers v. Harvey, 2 Penn. 478.

[3] Cole v. Davies, 1 Ld. Raym. 724.

[4] Anderson v. Brooks, 11 Ala. 953. [5] Batchelder v. Carter, 2 Vt. 168.

[6] Stephens v. Barnett, 7 Dana, 257; Tavenner v. Robinson, 2 Rob. 280; Robinson v. Roberts, 2 Pearson, 232.

[7] Tavenner v. Robinson, 2 Rob. 280.

of the transfer does not make every public sale, with or without delivery, good. The question of fraud is always open, and fraud vitiates every sale.[1]

When Change is Impossible.—The acts that will constitute a delivery vary in the different classes of cases, and depend very much upon the character and quantity of the property sold, as well as the cirumstances of each particular case. Such possession only need be taken as the nature of the case will permit.[2] Whenever the property is not so in the power of the vendor as that he can give, or so in the reach of the vendee as that he can receive possession, the want of delivery does not constitute fraud, provided the vendee takes possession as soon as it can reasonably be had. The same acts are not necessary to make a good delivery of ponderous articles, like a block of granite or a stack of hay, as is required in case of an article of small bulk, as a parcel of bullion.[3] There must be a manual delivery of a single sack of grain at the moment of its sale, but upon the sale of two thousand sacks this cannot be done without incurring great and unnecessary expense and departing from the usual course of business.[4] Upon the sale of furniture in a dwelling-house, the property may be removed to another house, or the vendor may leave the house and the vendee take possession with all the ordinary *indicia* of ownership;[5] but in case of a sale of a large hotel, with many hundred lodging rooms, parlors and sitting-rooms, besides the culi-

[1] Pennington v. Chandler, 5 Harring. 394; Taylor v. Mills, 2 Edw. Ch. 318; Dickenson v. Cook, 17 Johns. 332; Farrington v. Caswell, 15 Johns. 430.

[2] Manton v. Moore, 7 T. R. 67.

[3] Samuels v. Gorham, 5 Cal. 226; Doane v. Eddy, 16 Wend. 523; Randall v. Cook, 17 Wend. 53.

[4] Lay v. Neville, 25 Cal. 545.

[5] Steelwagon v. Jeffries, 44 Penn. 407.

nary department, with its necessary offices all duly furnished, the furniture cannot be removed without great deterioration and expense. It is valuable mainly for the purpose for which it is used and in the place where it is situated [1] Upon the sale of a single board, or of a cartload of boards, it would not do to set up a constructive delivery by marking and letting it remain where it is until it is convenient to remove it. The court would be bound to hold as a matter of law that such articles are capable of actual delivery; but it would be different with a board-yard filled with many piles of lumber. There the circumstances are such as to render an actual delivery and removal impracticable, or at least injurious and expensive. The vendee must assume the control and do all that an honest man would reasonably be expected to do to advertise the public of the sale.[2] In such instances the rule is not impaired, but the case does not come within it.[3]

PONDEROUS ARTICLES.—Bricks in the kiln,[4] mown hay in the field,[5] unbaled hay,[6] cattle roaming over uninclosed plains,[7] growing crops,[8] trees in the woods,[9] and a safe,[10]

[1] McKibbin v. Martin, 64 Penn. 352.

[2] McKibbin v. Martin, 64 Penn. 352; Long v. Knapp, 54 Penn. 514; Haynes v. Hunsicker, 26 Penn. 58.

[3] Sydnor v. Gee, 4 Leigh, 535; Land v. Jeffries, 5 Rand. 211, 599.

[4] Allen v. Smith, 10 Mass. 308. [5] Chaffin v. Doub, 14 Cal. 384.

[6] Conway v. Edwards, 6 Nev. 190; Ticknor v. McClelland, 84 Ill. 471; Thompson v. Wilhite, 81 Ill. 356; Hart v. Wing, 44 Ill. 141.

[7] Walden v. Murdock, 23 Cal. 540.

[8] Bernal v. Hovious, 17 Cal. 541; Robbins v. Oldham, 1 Duvall, 28; Herron v. Fry, 2 Penn. 263; Bellows v. Wells, 36 Vt. 599; Morton v. Ragan, 5 Bush. 334; Visher v. Webster, 13 Cal. 58; Cummins v. Griggs, 2 Duvall, 87. By statute in California, a mortgage of growing crops must be recorded, and possession taken as soon as they are harvested. (Quiriaque v. Dennis, 24 Cal. 154.)

[9] Fitch v. Burk, 38 Vt. 683. [10] Benford v. Schell, 55 Penn. 393.

are instances of articles not susceptible of immediate change of possession. Machinery which may be separated from the building and removed without injury to it or the building, must be delivered at the time of the sale.[1] If a person buys a store of goods, he may continue the business in the same place.[2]

WHAT CHANGE NECESSARY.—In the case of ponderous articles, it is not necessary that there should be an actual removal of the goods and change of possession from hand to hand.[3] Every species of divestiture which can give the world notice should, however, be resorted to.[4] Each case must in a great manner depend upon its own circumstances in regard to the acts that may be requisite to manifest the actual and continued change of possession.[5] It is sufficient that the vendee assumes the direction and control, and in such an open, notorious manner as usually accompanies an honest transaction. Whether all is done that ought to be done, and whether the change of possession is real and *bona fide*, not merely colorable and deceptive, are questions of fact that ought to be submitted to the jury.[6] If a kiln of bricks is left in the exclusive possession of the vendor,

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[1] Swift v. Thompson, 9 Conn. 63; Tobias v. Francis, 3 Vt. 425; Gaylor v. Harding, 37 Conn. 508. By statute in Vermont, there need be no change of possession of machinery when the mortgage is recorded. (Walworth v. Readsboro, 24 Vt. 252.)

[2] Hugus v. Robinson, 24 Penn. 9; Warner v. Norton, 20 How. 448; Hall v. Parsons, 15 Vt. 358; s. c. 17 Vt. 271; Dunlap v. Bournonville, 26 Penn. 72; Ford v. Chambers, 28 Cal. 13.

[3] Cartwright v. Phœnix, 7 Cal. 281; Luckenbach v. Brickenstein, 5 W. & S. 145; Allen v. Smith, 10 Mass. 308.

[4] Chase v. Ralston, 30 Penn. 539; Hutchins v. Gilchrist, 23 Vt. 82.

[5] Lay v. Neville, 25 Cal. 545.

[6] McKibbin v. Martin, 64 Penn. 352; Chase v. Ralston, 30 Penn. 539; Lay v. Neville, 25 Cal. 545.

the sale will be fraudulent.[1] But setting up stakes in the yard and marking the bricks, if notorious, is sufficient.[2] Merely telling the hands and others that a raft belongs to the vendee is not a sufficient delivery. The vendor can leave the raft after making a public declaration in the presence of witnesses that he delivers it up to the vendee.[3] A formal delivery of timber, accompanied with marking and counting, is sufficient without any measurement.[4] It is not necessary that the marking of lumber in piles should be done immediately at the time of the delivery. It is sufficient if it is done within a reasonable time, that is as soon as it conveniently can be done.[5] The delivery of the key where goods are locked up is a delivery of the goods themselves.[6] It will be symbolical only when the vendor remains in apparent connection with the goods, but is valid in other cases.[7] The vendor may be employed to cut and cure growing crops.[8] The vendee is entitled to a reasonable time in which to complete the delivery, by reducing the goods into his actual possession.[9]

DISTANCE.—When the chattels sold are so situated in regard to distance that there can be no delivery at the time of the sale, the case forms an exception to the general rule, and it is sufficient if the vendee without any gross

[1] Woods v. Bugbey, 29 Cal. 466; Richards v. Schroeder, 10 Cal. 431.

[2] Allen v. Smith, 10 Mass. 308.

[3] Cadbury v. Nolen, 5 Penn. 320.

[4] Chase v. Ralston, 30 Penn. 539; Sanborn v. Kittredge, 20 Vt. 632; Hutchins v. Gilchrist, 23 Vt. 82; Haynes v. Hunsicker, 26 Penn. 58.

[5] Long v. Knapp, 54 Penn. 514.

[6] Barr v. Reitz, 53 Penn. 256; Benford v. Schell, 55 Penn. 393.

[7] Barr v. Reitz, 53 Penn. 256.

[8] Cummins v. Griggs, 2 Duvall, 87; Fitch v. Burk, 38 Vt. 683. *Contra*, Welsh v. Beekey, 1 Penn. 57.

[9] Haynes v. Hunsicker, 26 Penn. 28; Walden v. Murdock, 23 Cal. 540.

laches takes possession and asserts his title in a reasonable time after he has an opportunity to take possession.[1] It is not in the power of the parties under such circumstances to deliver the possession, and consequently a delivery is not required. A familiar example of this doctrine is in the case of a sale of a ship,[2] or of goods at sea,[3] where possession is dispensed with upon the plain ground of its impossibility, and it is sufficient if the vendee takes possession of the property within a reasonable time after its return. The exception extends to protect contracts relating to ships which are at home, but in a port distant from the place where the contract is made. The distance between the place of sale and the port is immaterial.[4] The transfer of ships is commonly made by a bill of sale, and the title passes upon the execution of the instrument.[5] The delivery of the bill of lading and policy of insurance is sufficient in sales of goods.[6]

The vendee is not bound to follow the vessel from port to port, but may reasonably wait her return to the port where she belongs, and where the bill of sale is executed.[7] If the vendee appears chargeable with neglect in not taking possession seasonably, it is only evidence of

[1] Ricker v. Cross, 5 N. H. 570; Meade v. Smith, 16 Conn. 346; *vide* Burnell v. Robertson, 10 Ill. 282.

[2] Atkinson v. Maling, 2 T. R. 462; Badlam v. Tucker, 18 Mass. 389; Morgan v. Biddle, 1 Yeates, 3.

[3] Conard v. Atlantic Ins. Co., 1 Pet. 386; Portland Bank v. Stacey, 4 Mass. 661; Dawes v. Cope, 4 Binn. 258; Gardner v. Howland, 19 Mass. 599.

[4] Putnam v. Dutch, 8 Mass. 287.

[5] Putnam v. Dutch, 8 Mass. 287; Portland Bank v. Stacey, 4 Mass. 661. In England the delivery is made by delivering the grand bill of sale. In Portland Bank v. Stacey, 4 Mass. 661, it is said that there is no distinction between what is commonly called the grand bill of sale in England, which is necessary to pass ships at sea, and the bills of sale for vessels used in America.

[6] Dawes v. Cope, 4 Binn. 258.

[7] Badlam v. Tucker, 18 Mass. 389.

fraud, and may be explained.[1] But where the delay and negligence are gross, they will of themselves defeat the conveyance against any subsequent attacking creditor. Whether they exist or not depends upon the situation and circumstances of the vessel and of the vendee.[2] What precise period is embraced under the term reasonable time, and when that degree of negligence is imputable by which a transfer is vacated, has not been distinctly settled to a day or an hour.[3] A delay for one year has been held to amount to an abandonment of all right under the conveyance.[4] A return and stay for eleven days, if unknown to the vendee, and departure upon another voyage does not vitiate the sale.[5] It is not necessary to have an agent in the home port when the vessel is expected in another port.[6] Seizure on legal process before the expiration of a reasonable time is sufficient excuse.[7] Notice to the captain of the transfer of the ship is equivalent to the taking of possession.[8]

Constructive Possession.—The rule has its origin in the doctrine that the retention of possession after a sale gives the vendor a false credit and deceives creditors. This can only occur in the case of an actual possession by the vendor, for wherever there is merely a constructive possession, all persons are put upon the inquiry. Such a possession does not give a false credit. It is therefore a

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[1] Badlam v. Tucker, 18 Mass. 389.

[2] Joy v. Sears, 26 Mass. 4; Mair v. Glennie, 4 M. & S. 240.

[3] Brinley v. Spring, 7 Me. 241. [4] Meeker v. Wilson, 1 Gall. 419.

[5] Turner v. Coolidge, 43 Mass. 350. [6] Joy v. Sears, 26 Mass. 4.

[7] Conard v. Atlantic Ins. Co., 1 Pet. 386; Putnam v. Dutch, 8 Mass. 287.

[8] Brinley v. Spring, 7 Me. 241.

general principle that a constructive possession will pass by a constructive delivery.[1] A bill of sale is sufficient, for it places the property at the disposal of the vendee, and gives him not only the title, but a constructive possession with power to reduce it to an actual possession at his own pleasure.[2] When the goods are in the possession of another part owner, a constructive delivery is sufficient.[3] When goods are in a warehouse, the delivery is complete by an order on the warehouseman, and the fact that the goods stand on the books of the warehouseman in the name of the vendor, who also sells some of them afterwards, will not make the sale fraudulent.[4] In case of a bailment, the property passes when the sale is completed, and no formal delivery is necessary. The sale is the only change of which the property is susceptible.[5] After the execution of the bill of sale, the vendee is entitled to a reasonable time either to give notice of the fact to the bailee or to take possession of the property. Whether he uses this diligence, or is so remiss that fraud ought to be inferred, is a question for the jury.[6]

Bailee.—If the vendor of goods in the care and keeping of a third person directs him to deliver them to the vendee, and the party holding the goods on notice and application of the vendee consents to retain the goods for him, it is a sufficient delivery and transfer, for the actual possession is then in such third person.[7] Notice to the

[1] Hutchins v. Gilchrist, 23 Vt. 82. [2] Hutchins v. Gilchrist, 23 Vt. 82.

[3] Thompson v. Wilhite, 81 Ill. 356. [4] Jones v. Dwyer, 15 East. 21.

[5] Linton v. Butz, 7 Penn. 89; Goodwin v. Kelly, 42 Barb. 194; Nash v. Ely, 19 Wend. 523; Butt v. Caldwell, 4 Bibb. 458.

[6] Ingraham v. Wheeler, 6 Conn. 277.

[7] Barney v. Brown, 2 Vt. 374; Spaulding v. Austin, 2 Vt. 555; Linton v. Butz, 7 Penn. 89; Whigham's Appeal, 63 Penn. 194; Kroesen v. Seevers, 5 Leigh, 434; Warner v. Norton, 20 How. 448; Harding v.

bailee, however, is all that is required. If he refuses to deliver the property to the vendee or to acknowledge his right to the same, this will not affect the rights of the vendee.[1] This is upon the ground that the vendor after such notice has neither the actual nor constructive possession and is divested of all control over the property.[2] The mere pendency of an attachment does not prevent the transfer, for the garnishee has the power to waive his right to hold possession of the property in favor of a purchaser.[3] The principle does not apply when the bailee is simply to pay over a part of the proceeds to the vendee.[4] The vendor may subsequently interfere temporarily to remove the property from one place to another as the agent of the vendee,[5] or may be employed to rent or sell the property.[6] If the property is really kept by the bailee in an open and notorious manner, the vendor may be employed as a driver.[7]

SERVANT.—This principle is not applicable to a mere servant.[8] The possession of a mere servant or hired man is but the possession of the master, and does not, like the

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Janes, 4 Vt. 462; Pierce v. Chipman, 8 Vt. 334; Kendall v. Fitts, 22 N. H. 1; Morse v. Powers, 17 N. H. 286; Hodgkins v. Hooks, 23 Cal. 581; Montgomery v. Hunt, 5 Cal. 366; Walcott v. Keith, 22 N. H. 196; Potter v. Washburn, 13 Vt. 558; Cartwright v. Phœnix, 7 Cal. 281; Worman v. Kramer, 73 Penn. 378; Comly v. Fisher, Taney, 121. In Vermont the transfer is not valid without notice to the bailee. Moore v. Kelley, 5 Vt. 34. Notice by the vendor alone is not sufficient. Judd v. Langdon, 5 Vt. 231.

[1] How v. Taylor, 52 Mo. 592.
[2] Harding v. Janes, 4 Vt. 462.
[3] Walcott v. Keith, 22 N. H. 196.
[4] Richards v. Schroeder, 10 Cal. 431.
[5] Kendall v. Fitts, 22 N. H. 1.
[6] Harding v. Janes, 4 Vt. 462.
[7] Worman v. Kramer, 73 Penn. 378.
[8] Doack v. Brubacker, 1 Nev. 218; Hurlburd v. Bogardus, 10 Cal. 518; Chester v. Bower, 55 Cal. 46.

possession of other third persons, put creditors upon inquiry. To give it that effect there must be some change in the labor, or something external to show to the world the new relation. Mere contract resting between the parties has no such effect.[1]

Subject to Interest of a Third Party.—Although the property has been hired out, the owner may transfer the right, subject to the terms upon which it has been hired. The subsequent holding by the person who hired it should not be treated as the possession of the vendor, opposed to the transfer of right. The possession does not continue to be the possession of the vendor. It is not in its nature incompatible with the right transferred, and ought not, therefore, to stamp the contract as fraudulent in itself. With the transfer of right in the property, the right of possession, subject to the qualified interest held by another, is also transferred. The possession of such third person is a possession connected with the right of property, and ought, therefore, rather to be regarded, in the hands of the person hiring, as following the transfer of the right of property in the hands of the purchaser.[2] Mere notice, without any consent to hold for the vendee, will make the transfer unimpeachable.[3]

Upon Another's Land.—The same principle applies when the chattels are upon the land of another. Such goods are not in the actual possession or beneficial use of

[1] Flanagan v. Wood, 33 Vt. 332; Sharon v. Shaw, 2 Nev. 289; Sleeper v. Pollard, 28 Vt. 709; Gray v. Corey, 48 Cal. 208.

[2] Butt v. Caldwell, 4 Bibb. 458; Kroesen v. Seevers, 5 Leigh, 434; Lynde v. Melvin, 11 Vt. 683; Roberts v. Guernsey, 3 Grant, 237; Thomas v. Hillhouse, 17 Iowa, 67.

[3] Wooley v. Edson, 35 Vt. 214.

the debtor. All that he has is a constructive possession, flowing from his general right of property, and this possession will follow the right of property under a bill of sale. After the execution of the bill of sale, the goods can not be considered as remaining even in his constructive possession. Much less has he any beneficial use and possession.[1] It is not necessary that there should be a change in the local situation of the property, for there may be a change in the possession, while the site of the property remains the same.[2] It is sufficient if the former owner is divested of the legal and ostensible control. When his connection with the article has ceased, it will not be presumed that he is in the visible, ostensible occupancy of the land.[3] The vendee is entitled to a reasonable time to take possession of the goods.[4]

PRIOR TO EXECUTION.—When there is no change of possession at the time of the sale, it will be sufficient if the vendee takes possession before the right of a creditor attaches, by levy under an execution or other legal process.[5] If the change does not immediately follow the sale, it is proper matter to go to the jury, on the question

[1] Hutchins v. Gilchrist, 23 Vt. 82.

[2] Hutchins v. Gilchrist, 23 Vt. 82; Cartwright v. Phœnix, 7 Cal. 281; Merritt v. Miller, 13 Vt. 416.

[3] Merritt v. Miller, 13 Vt. 416.

[4] Walden v. Murdock, 23 Cal. 540; Morse v. Powers, 17 N. H. 286.

[5] Bartlett v. Williams, 18 Mass. 288; Hall v. Parsons, 15 Vt. 358; S. C. 17 Vt. 271; Kendall v. Samson, 12 Vt. 515; Read v. Wilson, 22 Ill. 377; Calkins v. Lockwood, 16 Conn. 276; Blake v. Graves, 18 Iowa, 312; Cruikshank v. Cogswell, 26 Ill. 366; Sydnor v. Gee, 4 Leigh, 535; Clute v. Steele, 6 Nev. 335; Smith v. Stern, 17 Penn. 360. *Contra*, Carpenter v. Mayer, 5 Watts, 483; Gibson v. Love, 4 Fla. 217; Chenery v. Palmer, 6 Cal. 119; Hackett v. Manlove, 14 Cal. 85; Ragan v. Kennedy, 1 Tenn. 91; Gardenier v. Tubbs, 21 Wend. 169; Claytor v. Anthony, 6 Rand. 285; Hall v. Gaylor, 37 Conn. 550.

of a fraudulent sale in fact.[1] When the possession has been with the vendee for a long period, the transfer is valid, although the property remained with the vendor for a considerable time after the sale.[2] It is not sufficient to take possession after the vendor's death.[3]

CHANGE AS TO PART.—Leaving a part of the goods in the possession of the vendor does not affect the part of which the vendee has the possession. Though it is, in point of law, conclusive of the voidness of the sale, to the extent of the property thus remaining in the possession of the vendor, it can not determine conclusively, and as to other property, the question of fact whether the vendee, in making the purchase, intended to defraud the creditors of the vendor, or to aid him in the accomplishment of that object. Such a fact is not of itself, and without regard to the other facts of the case, sufficient to require the conclusion that the whole sale is fraudulent and void.[4] The transfer is good and operative as to the articles delivered, and void and inoperative as to the residue.[5] But the possession and use of a part of the goods by the vendor is evidence to be weighed by the jury, in determining upon the honesty and validity of the transaction.[6]

CONTINUED.—The change of possession must not only be actual, but it must be continued in order to render a

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[1] Kendall v. Samson, 12 Vt. 515; Cruikshank v. Cogswell, 26 Ill. 366.

[2] Henderson v. Mabry, 13 Ala. 713; Mauldin v. Mitchell, 14 Ala. 814.

[3] Shields v. Anderson, 3 Leigh, 729; Edwards v. Harben, 2 T. R. 587.

[4] Brown v. Foree, 7 B. Mon. 357.

[5] Weller v. Wayland, 17 Johns. 102; De Wolf v. Harris, 4 Mason, 515; s. c. 4 Pet. 147; Lee v. Huntoon, 1 Hoffm. Ch. 447; Spaulding v. Austin, 2 Vt. 555; Brown v. Foree, 7 B. Mon. 357; De Bardleben v. Beekman, 1 Dessau. 346; Hessing v. McCloskey, 37 Ill. 341.

[6] Spaulding v. Austin, 2 Vt. 555; Brown v. Foree, 7 B. Mon. 357. *Contra*, Foster v. Hugh, 20 Miss. 416.

sale valid as against the vendor's creditors;[1] but one or more acts of intermeddling with the property by the vendor, after the sale, do not amount to a retention of possession.[2] A few and fitful instances of use by the vendor,[3] or temporary acts of ownership, without the consent of the vendee, will not vitiate the sale.[4] Temporary lendings or hirings,[5] or a temporary interference by the vendor, to remove the property from one place to another,[6] will not render the transaction void. But a mere temporary change, if the property revert immediately into the possession of the vendor, is not sufficient.[7] As the change of possession is necessary to consummate or perfect the vendee's right or title, if it is omitted through the neglect or disobedience of an agent, and the property thus finds its way back into the possession of the vendor, the vendee must bear the consequences.[8] But when the property at the time of the sale is in the hands of a bailee for a time limited, and the vendee has no right to immediate possession, and can not select an agent to take or keep possession for him, the fact that the bailee permits the property to go back into the possession of the vendor before the determination of his right, will not avoid the sale.[9]

SUBSEQUENT RETURN.—The rule is not an absolute prohibition of any subsequent return of the property into the

[1] Miller v. Garman, 69 Penn. 134; Leech v. Shantz, 2 Phila. 310; s. c. 5 A. L. Reg. 620; Norton v. Doolittle, 32 Conn. 405.

[2] Lake v. Morris, 30 Conn. 201.

[3] Farnsworth v. Shepard, 6 Vt. 521; Lyndon v. Belden, 14 Vt. 423.

[4] Hodgkins v. Hook, 23 Cal. 581.

[5] Farnsworth v. Shepard, 6 Vt. 521; Lyndon v. Belden, 14 Vt. 423.

[6] Kendall v. Fitts, 22 N. H. 1.

[7] Morris v. Hyde, 8 Vt. 352; Norton v. Doolittle, 32 Conn. 405; Weeks v. Weed, 2 Aik. 64; Goldsbury v. May, 1 Litt. 254.

[8] Morris v. Hyde, 8 Vt. 352.

[9] Lynde v. Melvin, 11 Vt. 683.

possession of the vendor. After the sale has become perfected by such visible, notorious and continued change of possession, that the creditors of the vendor may be presumed to have notice of it, a return of the property to the vendor will not, by its own mere operation, render the transaction fraudulent.[1] Before the return there must be such a change of possession as indicates to the world at large a change of ownership. It must be open, visible, and substantial, and such an one as indicates a change of possession, or a sufficient explanation should exist to show why the possession was not changed. It should be such as may fairly lead those around, if they have any interest in the matter, to a reasonable belief that there has been a sale and change of property.[2] The ostensible nature and purpose of the vendee's possession, as well as its duration, will be considered in determining whether it is so manifest and substantial as to be unprejudiced by allowing the property to return to the vendor's control.[3] If the property has been attached, this will assist in giving notoriety to the transfer.[4] The change of possession must also continue for such a length of time as will be likely to operate as a general advertisement of the change of title.[5] It is impossible to lay down a fixed rule applicable to all cases establishing the length of time a vendee of personal property should continue in the exclusive possession. Each case must necessarily be governed and determined by its

[1] Brady v. Haines, 18 Penn. 113; Graham v. McCreary, 40 Penn. 515; Clark v. Morse, 10 N. H. 236; French v. Hall, 9 N. H. 137; Prosser v. Henderson, 11 Ala. 484; Sutton v. Shearer, 1 Grant, 207; Carpenter v. Clark, 2 Nev. 243; Johnson v. Willey, 46 N. H. 75; Stevens v. Irwin, 15 Cal. 503; Waldie v. Doll, 29 Cal. 555; Lewis v. Wilcox, 6 Nev. 215; Brown v. Riley, 22 Ill. 45; Neece v. Haley, 23 Ill. 416. *Contra*, Van Pelt v. Littler, 10 Cal. 394; Bacon v. Scannell, 9 Cal. 271.

[2] Clark v. Morse, 10 N. H. 236.

[3] Houston v. Howard, 39 Vt. 54.

[4] Clark v. Morse, 10 N. H. 236.

[5] Carpenter v. Clark, 2 Nev. 243.

own peculiar circumstances.[1] Eight or ten days[2] has been deemed insufficient.[3] The vendee after such an open change of the possession, may lend or let the goods to the vendor or employ him to sell or perform any other service about them with the same safety as he may a stranger.[4] But the return can only be for a temporary purpose. The vendor cannot have the permanent possession and use of them in his own business.[5] A minor son may, however, purchase them in good faith, and bring them home to his father's, where he resides.[6]

CHOSES IN ACTION.—An assignment of a chose in action is subject to the rule which requires a change of possession.[7] In the case of things in action, the usual muniments of title should be conferred upon the grantee. In the case of stocks, the natural and appropriate indication of ownership is the entry upon the stock record.[8]

There is no distinction between prior and subsequent creditors.[9]

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[1] Weil v. Paul, 22 Cal. 492.

[2] Weeks v. Wead, 2 Aik. 64; Rogers v. Vail, 16 Vt. 327; Mills v. Warner, 19 Vt. 609; Miller v. Garman, 69 Penn. 134; Look v. Comstock, 15 Wend. 244. *Contra*, Cunningham v. Hamilton, 25 Ill. 228; Wright v. Grover, 27 Ill. 426.

[3] Brady v. Haines, 18 Penn. 113.

[4] Dewey v. Thrall, 13 Vt. 281; Harding v. Janes, 4 Vt. 462; Brady v. Haines, 18 Penn. 113; Bond v. Bronson, 80 Penn. 360.

[5] Mills v. Warner, 19 Vt. 609. [6] Jordan v. Frink, 3 Penn. 442.

[7] Welsh v. Bekey, 1 Penn. 57; Woodbridge v. Perkins, 3 Day, 364; Hall v. Redding, 13 Cal. 214.

[8] Pinkerton v. Manchester R. R. Co., 42 N. H. 424; Shipman v. Ætna Ins. Co., 29 Conn. 245.

[9] Clow v. Woods, 5 S. & R. 275; Young v. Pate, 4 Yerg. 164; Smith v. Lowell, 6 N. H. 67; Paul v. Crooker, 8 N. H. 288; Woodrow v. Davis, 2 B. Mon. 296; Raukin v. Holloway, 11 Miss. 614; Smith v. McDonald, 25 Geo. 377.

LAND.—Possession of real estate is not without weight, and in a doubtful case may strengthen any just suspicions arising from other causes. But it does not *per se* raise a presumption of fraud as it does in the case of personal estate. Possession is *prima facie* evidence of ownership. The same rule does not apply to real estate. Possession is not there deemed evidence of ownership. The laws of most nations require solemn instruments to pass the title to real property. The public look not so much to possession as to the public records, as proofs of the title to such property. The possession must therefore be inconsistent with the sale and repugnant to it in terms or operation, before it raises a just presumption of fraud.[1]

[1] Phettiplace v. Sayles, 4 Mason, 312; Every v. Edgerton, 7 Wend. 259; Waller v. Todd, 3 Dana, 503; Avery v. Street, 6 Watts, 247; Bank of U. S. v. Houseman, 6 Paige, 526; Paulling v. Sturgus, 3 Stew. 95; Barr v. Hatch, 3 Ohio, 527; Short v. Tinsley, 1 Met. (Ky.) 397; Tibbals v. Jacobs, 31 Conn. 428; Merrill v. Locke, 41 N. H. 486; Lyne v. Bank of Ky., 5 J. J. Marsh. 545; Allentown Bank v. Beck, 49 Penn. 394; Ludwig v. Highley, 5 Penn. 132.

CHAPTER VII.

PREFERENCES.

No New Consideration Necessary in Case of a Preference.—Where creditors take no specific security from their debtor, they trust him upon the general credit of his property and a confidence that it will not be diminished to their prejudice. They have, therefore, an equitable interest in it which the law, under certain circumstances, recognizes and enforces. The statute is founded upon the principle of protecting this equitable right. When a transfer, however, is made to a creditor, his equity is the same as that of the others, and he is entitled to the benefit of the universal rule, that where the equities are equal the legal title must prevail. An existing indebtedness is, therefore, a good consideration within the proviso which saves the rights of *bona fide* purchasers. There being no equity prior to that of the vendee, the necessity which calls for a new consideration in other cases does not exist.[1]

Right to Prefer is a Consequence of Ownership.—Creditors generally trust a debtor upon the faith of his property, and look to it for payment. Their means, more-

[1] Seymour v. Wilson, 19 N. Y. 417; Adams v. Wheeler, 27 Mass. 199; Gibson v. Seymour, 4 Vt. 518; Gleason v. Day, 9 Wis. 498; Seymour v. Briggs, 11 Wis. 196; McMahan v. Morrison, 16 Ind. 172; Wilson v. Ayer, 7 Me. 207; Towsley v. McDonald, 32 Barb. 604; Stacy v. Deshan, 14 N. Y. Supr. 449; *vide* Harney v. Pack, 12 Miss. 229; Pope v. Pope, 40 Miss. 516.

over, contribute equally to the fund with which it is acquired. They therefore have an equally equitable claim for remuneration out of it. The abstract principles of natural justice dictate that it should be applied for the equal benefit of all creditors, but this has been found impracticable without the aid of some artificial system. If the right to give a preference were to be denied while an insolvent debtor retains his property in his own hands, he could not pay anybody, for whoever he paid would receive a preference. Such a principle would take away a man's rights over his own property, and involve the necessity of vesting an inquisitorial power somewhere.[1] The common law had no means or device to form such a power or to execute such a principle. It therefore adopted an altogether different set of principles. The obligation of a debtor is purely personal, and in no way affects his property or any portion of it. His right to use, control and dispose of it is, in the absence of any statute, absolute, and he is in no manner subject to the dictation of his creditors, for they have no legal right in it by reason of being creditors.[2] It is upon this ground that the right to prefer rests. So long as the property of a debtor remains in his hands unshackled by liens or incumbrances, his power over it is absolute, and he can, in the absence of any statute, dispose of it by way of satisfaction to his creditors as well as by sale.[3] A debtor therefore has a discretion within the limits of fraud. Society has to depend for its indemnity upon the teachings of his heart

[1] Wilson v. Forsyth, 24 Barb. 105.

[2] Lampson v. Arnold, 19 Iowa, 479.

[3] Grover v. Wakeman, 11 Wend. 187; s. c. 4 Paige, 23; Dance v. Seaman, 11 Gratt. 778; Wilson v. Forsyth, 24 Barb. 105; Lupton v. Cutter, 25 Mass. 298; Robinson v. Rapelye, 2 Stew. 86; Tillou v. Britton, 9 N. J. 120.

and conscience; upon those moral lights which all men possess, and upon the native sense of justice.[1]

THE LAW KNOWS NO DISTINCTION BETWEEN DEBTS.—The right of preference has been advocated by many enlightened jurists, on the ground that the debtor, possessing an intimate knowledge of the relative equities of his creditors, could make a more just distribution than the law. It has been said that there are some debts which a person honestly may, and even ought to prefer.[2] The notion, however, of honorable debts, in contradistinction to other debts founded on a fair and adequate consideration, is a dangerous distinction, and calculated to injure and mislead the moral sense. The law does not recognize such a principle of honor, and the courts have no means by which they can test its purity, or separate it from arbitrary, selfish, or vindictive motives of preference. The principle is too uncertain, flexible and capricious in the application.[3] The law, moreover, can not recognize any distinction between legal obligations, nor defer its own wisdom and honesty to the wisdom and honesty of a delinquent debtor.[4]

A PREFERENCE NOT ALWAYS GIVEN TO MERITORIOUS DEBTS.—Experience also shows that a preference is sometimes given to the very creditor who is the least entitled to it, because he lent to the debtor a delusive credit, and that too, no doubt, under assurances of a well grounded confidence of priority of payment, and perfect indemnity in

[1] Niolon v. Douglas, 2 Hill Ch. 443.

[2] Murray v. Riggs, 15 Johns. 571; s. c. 2 Johns. Ch. 565; Dana v. Bank of U. S., 5 W. & S. 223.

[3] Murray v. Riggs, 15 Johns. 571; s. c. 2 Johns. Ch. 565.

[4] Grover v. Wakeman, 11 Wend. 187; s. c. 4 Paige, 23.

case of failure. It often happens that the creditor who has been the means of decoying others is secured, while the real business creditor, who parts with his property on liberal terms, and in manly confidence, is made the victim.[1] It is true that the debts preferred are usually considered and termed by the parties honorable and confidential, and these deceptive terms doubtless conceal from many the mischiefs and immorality of the system. But whether the terms are justly applied is a different question. There is, indeed, a mutual confidence and understanding when the debts are contracted. The friendly creditor lends his money or credit to furnish the capital which the borrower needs in the confidence, express or implied, that he shall incur no risk from the insolvency of the debtor, but that, in all events, whatever may be the losses and sufferings of others, he shall be protected. But a secret confidence by which the public is deceived, and creditors, excluded from its knowledge and benefits, made the victims of their credulity and ignorance—a confidence which, in respect to third persons, is a source of delusion and an instrument of fraud, assuredly deserves any other name than that of honorable. It is not an agreement that it implies, but a conspiracy.[2] Such an exercise of the right to prefer simply constitutes the debtor an agent to obtain money from one man and bestow it upon another at his will and pleasure.[3]

PREFERENCE NOT FAVORABLE TO COMMERCE.—It is thought by some that the right of preference favors commercial enterprise by affording to those destitute of capital

[1] Murray v. Riggs, 15 Johns. 571; s. c. 2 Johns. Ch. 565.
[2] Nicholson v. Leavitt, 4 Sandf. 252; s. c. 6 N. Y. 510; 10 N. Y. 591.
[3] Boardman v. Halliday, 10 Paige, 223.

a credit founded on the power of securing confidential at the expense of business creditors. If this is so, it is at best but a poor argument in its favor, for it is founded obviously in wrong. The facility of obtaining credit under such circumstances is, in theory, nothing more than a facility for committing fraud, and, in practice, has proved nothing less. The experience of all commercial communities leads to the conclusion that this power of preferring creditors is a fruitful source of fraud, and in every respect mischievous and unwholesome.[1] The right, moreover, is not always exercised in favor of so-called meritorious debts. An influential creditor is often preferred, while those who are poor, or are minors, or are absent, or want the means or spirit to engage in litigation, are abandoned.[2] The principle is also frequently perverted, and made subservient to the gratification of vindictive feelings, and to the perpetration of the foulest injustice, as well as ingratitude towards honest and confiding creditors.[3]

PREFERENCES NOT FRAUDULENT.—By virtue of his absolute dominion over his property a debtor, however, may either give or allow a preference. It is no part of the policy of the statute to prohibit its application to the payment of one debt rather than another. The maxim *vigilantibus non dormientibus leges subserviunt* applies. Hence it is that a creditor who can secure a sufficiency, according to law, to satisfy his claim, is entitled

[1] Grover v. Wakeman, 11 Wend. 187; s. c. 4 Paige, 23; Lupton v. Cutter, 25 Mass. 298; Atkinson v. Jordan, 5 Ohio, 295; s. c. Wright, 247.

[2] Murray v. Riggs, 15 Johns. 571; s. c. 2 Johns. Ch. 565; Grover v. Wakeman, 11 Wend. 187; s. c. 4 Paige, 23.

[3] Cunningham v. Freeborn, 11 Wend. 241; s. c. 1 Edw. 256; 3 Paige, 537.

to hold it against other creditors.[1] This right, moreover, is not affected by the debtor's insolvency,[2] or the preferred creditor's knowledge of such insolvency.[3]

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[1] Benton v. Thornhill, 2 Marsh. 427; s. c. 7 Taunt. 149; Eveleigh v. Purrsford, 2 Mood. & Rob. 539; Cameron v. Montgomery, 13 S. & R. 128; Ragan v. Kennedy, 1 Tenn. 91; Waterbury v. Sturtevant, 18 Wend. 353; McMenomy v. Roosevelt, 2 Johns. Ch. 446; Lewis v. Whittemore, 5 N. H. 364; Terry v. Belcher, 1 Bailey, 568; Phettiplace v. Sayles, 4 Mason, 312; Sommerville v. Horton, 4 Yerg. 541; Hoofsmith v. Cope, 6 Whart. 53; Maples v. Maples, Rice Ch. 300; Floyd v. Goodwin, 8 Yerg. 484; Wiley v. Lashlee, 8 Humph. 717; McQuinnay v. Hitchcock, 8 Tex. 33; Fromme v. Jones, 13 Iowa, 474; Parnell v. Howard, 26 Iowa, 38; Cowles v. Rickett, 1 Iowa, 582; Bruce v. Smith, 3 H. & J. 499; Cole v. Albers, 1 Gill, 412; Glenn v. Grover, 3 Md. 212; s. c. 3 Md. Ch. 29; Anderson v. Tydings, 3 Md. Ch. 167; Mayfield v. Kilgour, 31 Md. 240; Grogan v. Cooke, 2 Ball. & B. 233; Holbird v. Anderson, 5 T. R. 235; Green v. Tanner, 49 Mass. 411; Harrison v. Phillips' Academy, 12 Mass. 456; Guild v. Leonard, 35 Mass. 511; Buffum v. Green, 5 N. H. 71; Hendricks v. Robinson, 2 Johns. 283; s. c. 17 Johns. 438; Lewkner v. Freeman, Prec. Ch. 105; s. c. 1 Eq. Cas. Abr. 149; 2 Freem. 236; Williams v. Brown, 4 Johns. Ch. 682; M'Broom v. Rives, 1 Stew. 72; Eaton v. Patterson, 2 Stew. & Port. 9; Stover v. Harrington, 7 Ala. 142; Gary v. Colgin, 11 Ala. 514; Lowrie v. Stewart, 8 Ala. 163; Hinde v. Vattier, 1 McLean, 110; s. c. 7 Pet. 252; Coolidge v. Curtis, 7 A. L. Reg. 334; Blakey's Appeal, 7 Penn. 449; Worman v. Wolfersberger, 19 Penn. 59; Hutchinson v. McClure, 20 Penn. 63; Hickman v. Quinn, 6 Yerg. 96; Young v. Stallings, 5 B. Mon. 307; Bullock v. Irvine, 4 Munf. 450; Bates v. Coe, 10 Conn. 280; Kemp v. Walker, 16 Ohio, 118; Choteau v. Sherman, 11 Mo. 385; Moseley v. Gainer, 10 Tex. 393; Hubbard v. Taylor, 5 Mich. 155; Bull v. Harris, 18 B. Mon. 195; Walker v. Adair, 1 Bond, 158; Cox v. Fraley, 26 Ark. 20; Vose v. Stickney, 19 Minn. 367; Harkins v. Bailey, 48 Ala. 376; Morris v. Tillson, 81 Ill. 607; McWilliams v. Rodgers, 56 Ala. 87; Heidingsfelder v. Slade, 60 Geo. 596; Frank v. Welch, 89 Ill. 38; Preusser v. Henshaw, 49 Iowa, 41; King v. Phillips, 45 N. Y. Supr. 633; Totten v. Brady, 54 Md. 170.

[2] Glenn v. Grover, 3 Md. 212; s. c. 3 Md. Ch. 29; Waite v. Hudson, 1 Dane Ab. 635; Green v. Tanner, 49 Mass. 411; Auburn Bank v. Fitch, 48 Barb. 344; Williams v. Jones, 2 Ala. 314; Covanhovan v. Hart, 21 Penn. 495; Lloyd v. Williams, 21 Penn. 327; Ford v. Williams, 3 B. Mon. 550; Johnson v. McGrew, 11 Iowa, 151; Galloway v. People's Bank, 54 Geo. 441.

[3] Terry v. Belcher, 1 Bailey, 568; Sibley v. Hood, 3 Mo. 290; Hindman v. Dill, 11 Ala. 689; Fromme v. Jones, 13 Iowa, 474; Hessing v.

ALTHOUGH OTHERS LOSE THEIR DEBTS.—The fact that a suit is pending,[1] or that the transfer includes all the debtor's property,[2] or all the property which is not exempt from execution,[3] or that other creditors lose their debts by reason of the debtor's inability to meet all the demands against him,[4] does not necessarily affect the validity of the preference. There is a distinction to be observed between the effect of a transfer by a debtor in failing circumstances made to pay one or more of his debts, and that intent to hinder, delay or defraud his other creditors against which the statute is aimed. The effect of the preference may be to delay them, or even to prevent them from obtaining payment at all; but if the motive is to pay the preferred debt, the transaction is not invalidated. The statute is aimed only at intended fraud, but the payment of a debt to one

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McCloskey, 37 Ill. 341; Green v. Tanner, 49 Mass. 411; Walsh v. Kelley, 42 Barb. 98; s. c. 27 How. Pr. 359; Johnson v. McGrew, 11 Iowa, 151; Olmstead v. Mattison, 45 Mich. 617.

[1] Kuykendall v. McDonald, 15 Mo. 416; Waterbury v. Sturtevant, 18 Wend. 353; Pringle v. Sizer, 2 Rich. (N. S.) 59; Allen v. Kennedy, 49 Wis. 549.

[2] Alton v. Harrison, L. R. 4 Ch. Ap. 622; Sibly v. Hood, 3 Mo. 290; Giddings v. Sears, 115 Mass. 505; Hale v. Stewart, 14 N. Y. Supr. 591.

[3] Young v. Dumas, 39 Ala. 60.

[4] Ocoee Bank v. Nelson, 1 Cold. 186; Ferguson v. Kumler, 11 Minn. 104; Lee v. Flannagan, 7 Ired. 471; Hopkins v. Beebe, 26 Penn. 85; Keen v. Kleckner, 42 Penn. 529; Lord v. Fisher, 19 Ind. 7; McGregor v. Chase, 35 Vt. 225; Prior v. White, 12 Ill. 261; Cason v. Murray, 15 Mo. 378; Hall v. Arnold, 15 Barb. 599; Ewing v. Runkle, 20 Ill. 448; Waddams v. Humphrey, 22 Ill. 661; Wheaton v. Neville, 19 Cal. 41; Brewster v. Bours, 8 Cal. 501; National Bank v. Sprague, 20 N. J. Eq. 13; Guignard v. Aldrich, 10 Rich. Eq. 253; Central R. R. Co. v. Claghorn, Speer's Ch. 545; Williams v. Jones, 2 Ala. 314; Giddings v. Sears, 115 Mass. 505, Laidlaw v. Gilmore, 47 How. Pr. 67; Francis v. Rankin, 84 Ill. 169; Jordan v. White, 38 Mich. 253.

creditor is no fraud upon other creditors—no legal injury to them.[1]

PREFERENCE NOT AFFECTED BY PERSON OR MODE.—The preference may be given to any lawful demand against the debtor, whether due or not,[2] and whether held by his brother,[3] his wife,[4] or his attorney,[5] or any other person. A corporation may prefer a director.[6] The preference may be given in any mode which the law recognizes as legal for effecting a transfer, whether by a mortgage,[7] or a deed,[8] or judgment,[9] or the transfer of a note,[10] or of any other pro-

[1] York County Bank v. Carter, 38 Penn. 446; Meade v. Smith, 16 Conn. 346; Kirtland v. Snow, 20 Conn. 23; Hessing v. McCloskey, 37 Ill. 341; Bentz v. Riley, 69 Penn. 71.

[2] Carpenter v. Muren, 42 Barb. 300; Hill v. Northrop, 9 How. Pr. 525.

[3] Thorpe v. Thorpe, 12 S. C. 154.

[4] Mayfield v. Kilgour, 31 Md. 240; Kyger v. Skirt Co., 34 Ind. 249; Kluender v. Lynch, 4 Keyes, 361; 2 Abb. Ap. 538; Buchner v. Stine, 48 Mo. 407; Wilkinson v. Wilkinson, 1 Head. 305; Mangum v. Finucane, 38 Miss. 354; Randall v. Lunt, 51 Me. 246; Monroe v. May, 9 Kans. 466; French v. Motley, 63 Me. 326; Jordan v. White, 38 Mich. 253; Tomlinson v. Matthews, 98 Ill. 178; Hill v. Bowman, 35 Mich. 191; Savage v. Dowd, 54 Miss. 728; Coleman v. Smith, 55 Ala. 368; Atlantic Nat'l Bank v. Tavenner, 130 Mass. 407; Loomis v. Smith, 37 Mich. 595.

[5] Hill v. Rogers, Rice Ch. 7.

[6] Central R. R. Co. v. Claghorn, Speers Ch. 545; Smith v. Skeary, 47 Conn. 47.

[7] Kennaird v. Adams, 11 B. Mon. 102; Jones v. Naughright, 10 N. J. Eq. 298; Carnall v. Duvall, 22 Ark. 136; Wiley v. Lashlee, 8 Humph. 717.

[8] Waterbury v. Sturtevant, 18 Wend. 353; Barr v. Hatch, 3 Ohio, 527; Buffum v. Green, 5 N. H. 71; Covanhovan v. Hart, 21 Penn. 495; Kemp v. Walker, 16 Ohio, 118; Morse v. Slason, 13 Vt. 296; Leadman v. Harris, 3 Dev. 144; Harrison v. Phillips' Academy, 12 Mass. 456.

[9] Wilder v. Winne, 6 Cow. 284; Hill v. Northrop, 9 How. Pr. 525; Davis v. Charles, 8 Penn. 82; Lowry v. Coulter, 9 Penn. 349; Siegel v. Chidsey, 28 Penn. 279; Greenwalt v. Austin, 1 Grant, 169; Meeker v. Harris, 19 Cal. 278; Shedd v. Bank, 32 Vt. 709; Beards v. Wheeler, 18 N. Y. Supr. 539.

[10] Savings Bank v. Bates, 8 Conn. 505; Tillon v. Britton, 9 N. J. 120.

perty. A large debt may be split up into small sums, so as to bring it within a magistrate's jurisdiction, and judgments may be confessed thereon, and the property of the debtor taken on executions.[1] An attachment may be issued, or a mortgage may be executed and placed on record,[2] without the knowledge of the creditor.[3] The debtor may also apply his labor to increase the value of property which has been mortgaged.[4] A preference may be given to secure a future or contingent liability as well as a present debt.[5] A mere representation that the creditor wishes to protect the property from executions, or putting other creditors off their guard as to the debtor's property,[6] will not of itself render the preference fraudulent.[7] The preference may be made to take effect at the death of the debtor.[8] The fact that the debtor at the time of giving the preference is about to abscond,[9] does not render it void.

INTENT TO DEFEAT AN EXECUTION.—A preference may be given and received for the express purpose of defeating an execution,[10] for the mere intent to defeat an execution

[1] Floyd v. Goodwin, 8 Yerg. 484; Newdigate v. Lee, 9 Dana, 17; L'Avender v. Thomas, 18 Geo. 668; Bank v. Planter's Bank, 22 Geo. 466; Alexander v. Young, 23 Geo. 616.

[2] Ensworth v. King, 50 Mo. 477.

[3] Baird v. Williams, 36 Mass. 381; *vide* Ryan v. Daly, 6 Cal. 238.

[4] Perry v. Pettingall, 33 N. H. 433.

[5] Pringle v. Sizer, 2 Rich. (N. S.) 59; Gibson v. Walker, 11 Ired. 327.

[6] Magee v. Raiguet, 64 Penn. 110.

[7] Reynolds v. Wilkins, 14 Me. 104.

[8] Morse v. Slason, 13 Vt. 296; Exton v. Scott, 6 Sim. 31.

[9] Garr v. Hill, 9 N. J. Eq. 210.

[10] Holbird v. Anderson, 5 T. R. 235; Wood v. Dixie, 53 E. C. L. 892; s. c. 7 Q. B. 892; Funk v. Staats, 24 Ill. 632; Darvill v. Terry, 6 H. & N. 807; Hall v. Arnold, 15 Barb. 599; Hartshorne v. Eames, 31 Me. 93; Gassett v. Wilson, 3 Fla. 235; Wheaton v. Neville, 19 Cal. 41; Kuykendall v. McDonald, 15 Mo. 416; Rich v. Levy, 16 Md. 74; Weller v. Way-

does not of itself constitute fraud. The payment of a just debt is what the law admits to be rightful, and is not, therefore, fraudulent, either in law or in fact. The preferred creditor cannot be affected injuriously with notice of the debtor's intent to prefer, and thereby defeat an execution, because the purpose is honest, and such as the law sanctions. This is not delaying or hindering within the meaning of the statute. It does not deprive other creditors of any legal right, for they have no right to a priority.[1] One creditor of a failing debtor is not, under the statute, bound to take care of the others. In such case, if the assets are not sufficient to pay all, somebody must suffer. It is a race in which it is impossible for every one to be foremost. He who has the advantage, whether he gets it by the preference of the debtor or by his own superior vigilance, or by both causes combined, is entitled, under the statute, to what he wins, provided he takes no more than his honest due. He is not obliged to look out for other creditors, or to consider whether they will or will not get their debts.[2] He does not violate any principle of the statute when he takes payment or security for his demand, though others are thereby deprived of all means of obtaining satisfaction of their own equally meritorious claims, and though he may be aware of the intent of the debtor to defeat the collection of them.[3] Fraud, in its

land, 17 Johns. 102; Waterbury v. Sturtevant, 18 Wend. 353; Wilder v. Winne, 6 Cow. 284; Barr v. Hatch, 3 Ohio, 527; Hendricks v. Mount, 5 N. J. 738; Walden v. Murdock, 23 Cal. 540; Goodwin v. Hamill, 26 N. J. Eq. 24; Steele v. Moore, 54 Ind. 52; Carpenter v. Cushman, 121 Mass. 265; Frazer v. Thatcher, 49 Tex. 26; Shelley v. Boothe, 73 Mo. 74; Nortcliffe v. Warburton, 4 DeG., F. & J. 449.

[1] Uhler v. Maulfair, 23 Penn. 481; Bird v. Sitken, Rice Eq. 73.

[2] Covanhovan v. Hart, 21 Penn. 495; Auburn Bank v. Fitch, 48 Barb. 344; Crawford v. Kirksey, 55 Ala. 282.

[3] Dana v. Stamfords, 10 Cal. 269; Waterbury v. Sturtevant, 18 Wend. 353; Thornton v. Davenport, 2 Ill. 296; Ford v. Williams, 3 B. Mon.

legal sense, cannot be predicated of such a transaction.[1] Wherever there is a true debt, and a real transfer for an adequate consideration, there is no collusion.[2]

SECRET MOTIVES IMMATERIAL.—All that the law requires in the case of a preference is good faith.[3] Where creditors are equally honest, they are equally favored by the law, and their rights are determined according to their respective priorities.[4] The secret motives which prompt the preference are immaterial. The law can take no cognizance of feelings and intentions which are not manifested by external conduct. It can not assign a bad motive to an act which is not wrong either in itself or in its necessary consequences. When the act is right, no secret feeling can change its character. In contemplation of law, the motive which results in proper action is not a bad one.[5] The desire to avoid a sacrifice,[6] or to prevent an expected criminal prosecution,[7] or an expectation to receive future employment,[8] or that the property will be settled upon the debtor's wife or family,[9] or mere caprice, or favoritism,

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550; Worland v. Kimberlin, 6 B. Mon. 608; Jones v. Naughright, 10 N. J. Eq. 298; Young v. Dumas, 39 Ala. 60; Gray v. St. John, 35 Ill. 222; Banfield v. Whipple, 96 Mass. 13; Kennaird v. Adams, 11 B. Mon. 102; Thornton v. Tandy, 39 Tex. 544; *vide* Ashmead v. Hean, 13 Penn. 584.

[1] Chase v. Walters, 28 Iowa, 460; Auburn Bank v. Fitch, 48 Barb. 344; Kennaird v. Adams, 11 B. Mon. 102.

[2] Clemens v. Davis, 7 Penn. 263.

[3] Phettiplace v. Sayles, 4 Mason, 312; Ford v. Williams, 3 B. Mon. 550.

[4] Lloyd v. Williams, 21 Penn. 327. [5] Bunn v. Ahl, 21 Penn. 387.

[6] Barr v. Hatch, 3 Ohio, 527; Wheaton v. Neville, 19 Cal. 41.

[7] Marbury v. Brooks, 7 Wheat. 556; s. c. 11 Wheat. 78.

[8] Crawford v. Austin, 34 Md. 49.

[9] Young v. Stallings, 5 B. Mon. 307; Cureton v. Doby, 10 Rich. Eq. 411.

or the gratification of secret ill-will,[1] does not affect the validity of the transfer, for such secret motives are not the subject of legal inquiry. Where there is merely a preference, even a jury is not at liberty to deduce fraud from that which the law pronounces honest.[2]

PREFERENCE MUST BE IN GOOD FAITH AND REAL.—A transfer, however, may be fraudulent, although it is made in consideration of an honest debt, for an honest claim may be used as a cover to a covinous transaction.[3] The distinction is between a transfer made solely by way of preference of one creditor over others, and a similar transfer made with a design to secure some benefit or advantage therefrom to the debtor,[4] or to delay creditors in the collection of their debts.[5] While the law permits an insolvent debtor to make choice of the persons he will pay, it denies him the right in doing it to contrive that other creditors shall never be paid,[6] or to use the debt of the preferred creditor as a colorable consideration to screen

[1] Spaulding v. Strang, 37 N. Y. 135; s. c. 38 N. Y. 9; 36 Barb. 310; 32 Barb. 235.

[2] York County Bank v. Carter, 38 Penn. 446; Gardner Nat'l Bank v. Hagar, 65 Me. 359.

[3] Welcome v. Balchelder, 23 Me. 85; Jarolawski v. Simon, 3 Brews. 37; Cox v. Miller, 54 Tex. 16; Pierce v. Rehfuss, 35 Mich. 53; Union Nat'l Bank v. Warner, 19 N. Y. Supr. 306; Phinizy v. Clark, 62 Geo. 623; Blanchard v. McKey, 125 Mass. 124; Thompson v. Furr, 57 Miss. 478.

[4] Banfield v. Whipple, 96 Mass. 13; Barr v. Hatch, 3 Ohio, 527; Bartels v. Harris, 4 Me. 146; Bullock v. Irvine, 4 Munf. 450; Giddings v. Sears, 115 Mass. 505; Bixby v. Carskaddon, 58 Iowa, 533; Cordes v. Straszer, 8 Mo. Ap. 61.

[5] Johnson v. Whitwell, 24 Mass. 71; Roe v. Harrison, 14 S. C. 624; Solberg v. Peterson, 27 Minn. 451; Livermore v. McNair, 34 N. J. Eq. 478; Mitchell v. McKibbin, 8 N. B. R. 548.

[6] Drury v. Cross, 7 Wall. 299; James v. Railroad Company, 6 Wall. 752; Gordon v. Clapp, 113 Mass. 335; Smith v. Schwed, 9 Fed. Rep. 483.

and protect his property from their claims,[1] or to delay, hinder, and embarrass them in the enforcement of their demands.[2]

ADEQUACY OF CONSIDERATION.—The amount of the property transferred compared with the debt intended to be secured or paid, and the number, amount, and character of the other debts, are proper subjects for consideration in determining the good faith of the transaction towards other creditors.[3] The property must bear a reasonable proportion to the preferred debt.[4]

PREFERENCE TAINTED BY SECRET TRUST.—The terms upon which the property is transferred must be free from

[1] Twyne's Case, 3 Co. 80; Moore, 638; Benton v. Tornhill, 2 Marsh. 427; 7 Taunt. 149; Graham v. Furber, 78 E. C. L. 410; 14 C. B. 410; Devries v. Phillips, 63 N. C. 53; Pulliam v. Newberry, 41 Ala. 168; Hartshorne v. Eames, 31 Me. 93; Passmore v. Eldridge, 12 S. & R. 198; Gans v. Renshaw, 2 Penn. 34; Goodhue v. Berrien, 2 Sandf. Ch. 630; Choteau v. Sherman, 11 Mo. 385; Johnson v. Sullivan, 23 Mo. 474; Clarkson v. White, 8 Dana, 11; Foster v. Grigsby, 1 Bush. 86; Kirtland v. Snow, 20 Conn. 23; Kuykendall v. McDonald, 15 Mo. 416; Constantine v. Twelves, 29 Ala. 607; Mangum v. Finucane, 38 Miss. 354; Prout v. Vaughan, 52 Vt. 451; David v. Birchard, 53 Wis. 492.

[2] Stoddard v. Butler, 20 Wend. 507; 7 Paige, 163; Reeves v. Shry, 39 Tex. 634; Kilby v. Haggin, 3 J. J. Marsh. 208; Cleveland v. Railroad Co., 7 A. L. Reg. 536; Edrington v. Rogers, 15 Tex. 188; Crowninshield v. Kittredge, 48 Mass. 520; Bunn v. Ahl, 29 Penn. 387; Hancock v. Horan, 15 Tex. 507; Reynolds v. Welch, 47 Ala. 200; Henderson v. Henderson, 55 Mo. 534; Smith v. Hardy, 36 Wis. 417; Cater v. Collins, 2 Mo. Ap. 225; Shelley v. Boothe, 73 Mo. 74.

[3] Glenn v. Grover, 3 Md. 212; S. C. 3 Md. Ch. 29; Adams v. Wheeler, 27 Mass. 199; Kuykendall v. McDonald, 15 Mo. 416; Edrington v. Rogers, 15 Tex. 188; Robinson v. Stewart, 10 N. Y. 189; Rahn v. McElrath, 6 Watts, 151; Hale v. Allnutt, 86 E. C. L. 505; S. C. 18 C. B. 505; Jarolawski v. Simon, 3 Brews. 37; Laidlaw v. Gilmore, 47 How. Pr. 67; Olmstead v. Mattison, 45 Mich. 617.

[4] Rahn v. McElrath, 6 Watts, 151; Robinson v. Stewart, 10 N. Y. 189; Jenkins v. Einstein, 3 Biss. 128; Shelton v. Church, 38 Conn. 416; Bailey v. Kennedy, 2 Del. Ch. 12; Dyer v. Rosenthal, 45 Mich. 588.

all engagements to deliver any portion of it for the benefit or advantage of the debtor, for the law will not tolerate any contrivance whereby the debtor devotes his property to certain creditors in preference to the rest, with the secret reservation of a possible interest to himself.[1] If the preference, therefore, is merely a temporary arrangement to prevent a sacrifice of the property and preserve the rights of all to an equal distribution, with an understanding that the property shall constitute a part of an assignment to be subsequently executed, it is fraudulent. Such an arrangement is against the policy of the law and the plain legal rights of other creditors.[2] Creditors also are not allowed to gain a preference by means of a secret undertaking to hold a part of the property for the benefit of the debtor. *Quod alias justum et bonum est, si per fraudem petatur, malum et injustum efficitur.* The law looks with great jealousy upon the manner of giving preferences, and denounces all departures from good faith, and requires that the parties shall not secure any covert advantage to the debtor in prejudice of his creditors.[3] The law, however, does not interdict every species of favor to an unfortunate debtor under the penalty of vacating all securities taken on those terms. On the contrary, a creditor may be as indulgent and show as much favor as he pleases as the price of obtaining security. Care must only be taken that there is no secret understanding constituting a trust in the creditor in derogation or contravention of the ostensible alienation, or the trans-

[1] Connelly v. Walker, 45 Penn. 449; Bentz v. Riley, 69 Penn. 71.

[2] Johnson v. Whitwell, 24 Mass. 71; Low v. Graydon, 50 Barb. 414; Dalton v. Currier, 40 N. H. 237.

[3] White v. Graves, 7 J. J. Marsh. 523; Garland v. Rives, 4 Rand. 282; Pettibone v. Stevens, 15 Conn. 19; Kissam v. Edmondson, 1 Ired. Eq. 180; Menton v. Adams, 49 Cal. 620.

fer will be deemed a cover, and consequently void.[1] If there is any such secret understanding, it will be void, although the creditor is not influenced by any fraudulent or improper motive, but makes the best arrangement that he can to secure his debt.[2]

CREDITOR'S BOUNTY.—The preferred creditor may give a portion of his debt, or the property received in payment of it, as a bounty to the family of the debtor, for the generosity is not at the expense of other creditors. In every case the inquiry is as to the rights of the creditors, and if they are not deprived of any right there is no ground to set aside the transfer. An act of spontaneous kindness and indulgence on the part of the creditor should not be confounded with fraud in the debtor, and the best feelings should not be chilled and stifled by an overweening tendency to detect collusion.[3] The gift, however, must be the act of the creditor, independent of any arrangement between the debtor and creditor at the time, or as a part of the contract to convey property either as a security or in apparent payment of the debt. The law looks to the substance and not the form of transactions. If a gift is forced from the creditor by making a transfer of a part of the debt or property to the debtor's family the condition and price for obtaining security or payment for the balance, the transaction is fraudulent. Whatever benefit is secured, either openly or covertly, to the debtor out of the effects conveyed by him is inconsistent with the pro-

[1] Jackson v. Brownell, 3 Caines, 222; Meeker v. Harris, 19 Cal. 278.

[2] Reynolds v. Welch, 47 Ala. 200; Humphries v. Freeman, 22 Tex. 45.

[3] Cureton v. Doby, 10 Rich. Eq. 411; Webb v. Roff, 9 Ohio St. 430; Young v. Dumas, 39 Ala. 60; Young v. Stallings, 5 B. Mon. 307; Winch v. James, 68 Penn. 297.

fessed purpose of conveying to satisfy or secure the debt to the creditor, and for that reason is *mala fide* and void.[1]

No Estoppel from Possession.—Although a debtor is credited upon the faith of his ownership of property, this does not prevent him from conveying it in good faith to a creditor in payment of a debt.[2]

Burden of Proof.—The burden of proof rests upon the creditors who impeach the preference,[3] and the fraudulent intent must be clearly shown.[4]

When Creditor may Purchase.—Although the purchase exceeds the amount of the indebtedness, still if the excess is reasonably necessary for attaining the lawful purpose of satisfying the actual debt, the purchase to the whole extent may be attributed to the same motive of self interest, and therefore the mere fact of the excess does not of itself invalidate the transaction, unless there are other circumstances tending to show a fraudulent intent on the part of the purchaser.[5] In payment for the excess the creditor may give either money or his note.[6]

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[1] Kissam v. Edmondson, 1 Ired. Eq. 180; Garland v. Rives, 4 Rand. 282; Marshall v. Hutchinson, 5 B. Mon. 298.

[2] Tomlinson v. Matthews, 98 Ill. 178; Syracuse Chilled Plow Co. v. Wing, 85 N. Y. 421; s. c. 27 N. Y. Supr. 206; Brookville Nat'l Bank v. Trimble, 76 Ind. 195; *vide* Budd v. Atkinson, 30 N. J. Eq. 530.

[3] Glenn v. Grover, 3 Md. 212; 3 Md. Ch. 29; Johnson v. McGrew, 11 Iowa, 151.

[4] Barr v. Hatch, 3 Ohio, 527; Jones v. Naughright, 10 N. J. Eq. 298.

[5] Young v. Stallings, 5 B. Mon. 307; Ford v. Williams, 3 B. Mon. 550; Little v. Eddy, 14 Mo. 160; Bear's Estate, 60 Penn. 430; Hobbs v. Davis, 50 Geo. 213; Troustine v. Lask, 4 Baxter, 162; Beurmann v. Van Buren, 44 Mich. 496; Reehling v. Byers, 94 Penn. 316.

[6] Hobbs v. Davis, 50 Geo. 213.

CHAPTER VIII.

THE BONA FIDES OF THE TRANSFER.

INSOLVENT DEBTOR MAY SELL.—The statute does not deprive a man of the power to sell or otherwise dispose of his property, although he may be insolvent,[1] and the mere fact that the transfer may tend to delay or hinder his creditors will not alone render it fraudulent. Many sales made in the ordinary course of business may and do defeat creditors who could have levied upon the property if it had been retained for a while longer, yet these are valid.[2] The power of a debtor to sell implies the corresponding right of another to purchase. Mere insolvency alone does not vitiate any transfer. In addition to the indebtedness there must be an intent on the part of the debtor to delay, hinder or defraud his creditors.

WHY INNOCENT VENDEE IS PROTECTED.—When the transfer is made for a valuable consideration there must be not only a fraudulent intent on the part of the debtor, but also a participation in that intent on the part of the grantee; for the statute excepts from its operation all estates or interests which are upon good consideration and *bona fide*, lawfully conveyed, or assured to any per-

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[1] Churchill v. Wells, 7 Cold. 364; Copis v. Middleton, 2 Madd. 410; Phettiplace v. Sayles, 4 Mason, 312; Pecot v. Armelin, 21 La. An. 667; Hardey v. Green, 12 Beav. 182; Smith v. Henry, 2 Bailey, 118; S. C. 1 Hill, 16; Miller v. Kirby, 74 Ill. 242.

[2] Atwood v. Impson, 20 N. J. Eq. 150.

son not having at the time of such conveyance or assurance to him made any manner of notice or knowledge of such covin, fraud or collusion. Creditors have an equitable interest in the property of the debtor which the law under certain circumstances recognizes and enforces, but when a valuable consideration is paid in good faith for a transfer, the interest of the creditor is superseded. The purchaser in such case, having parted with value upon the faith of the vendor's possession and ownership of the property, acquires not only the legal title, but an equity which is paramount to that of the creditors. It is obviously this equity alone arising out of the consideration paid which protects the rights of the purchaser, because the mere legal title is transferred by a gift as completely as by sale. The statute is based upon these principles. It is because both law and justice recognize the equitable interest of creditors in the property of the debtor that a transfer of such property to defeat their demands is declared to be void, and the right to a *bona fide* purchaser for a valuable consideration is protected by the statute, because the equity of such purchaser is superior to that of a mere general creditor, for the obvious reason that the purchaser has not like the creditors trusted to the personal responsibility of the debtor, but has paid the consideration upon the faith of the debtor's actual title to the specific property transferred.[1] A man paying a full and valuable consideration in good faith for the property may moreover justly suppose that the purchase, so far from diminishing the means of the vendor for paying his debts, will afford him a facility for doing so.[2] It is upon these grounds that the rights of a grantee who acts in good faith, and gives a valuable consideration, are protected although there may

[1] Seymour v. Wilson, 19 N. Y. 417. [2] Pierson v. Tom, 1 Tex. 577.

have been a fraudulent intent on the part of the debtor.[1] The same principle is asserted in the civil law, *Hoc edictum eum coercet qui sciens eum in fraudem creditorum hoc facere, suscepit quod in fraudem fiebat. Quare si quid in*

[1] Heroy v. Kerr, 21 How. Pr. 409; Carpenter v. Muren, 42 Barb. 300; Waterbury v. Sturtevant, 18 Wend. 353; Borland v. Mayo, 8 Ala. 104; Waters v. Riggin, 19 Md. 536; Troxall v. Dunnock, 24 Md. 163; Hessing v. McCloskey, 37 Ill. 341; Smith v. Henry, 2 Bailey, 118; s. c. 1 Hill, 16; Sibley v. Hood, 3 Mo. 290; Wilson v. Lott, 5 Fla. 305; Swinerton v. Swinerton, 1 Dane Ab. 628; Kittredge v. Sumner, 28 Mass. 50; Green v. Tanner, 49 Mass. 411; King v. Marissal, 3 Atk. 192; Badger v. Story, 16 N. H. 168; Johnson v. Johnson, 44 Mass. 63; Currier v. Taylor, 19 N. H. 189; Sands v. Hildreth, 14 Johns. 493; s. c. 2 Johns. Ch. 35; Waterbury v. Sturtevant, 18 Wend. 353; Hall v. Arnold, 15 Barb. 599; Anderson v. Hooks, 9 Ala. 704; Davis v. Tibbets, 39 Me. 279; McLaren v. Thompson, 40 Me. 284; Union Bank v. Toomer, 2 Hill Ch. 27; Blair v. Bass, 4 Blackf. 539; Thompson v. Saunders, 6 J. J. Marsh. 94; Violett v. Violett, 2 Dana, 322; Hutchinson v. Horn, 1 Smith, 242; s. c. 1 Ind. 363; Ratcliffe v. Trimble, 12 B. Mon. 32; Sterling v. Ripley, 3 Chand. 166; Splawn v. Martin, 17 Ark. 146; Ewing v. Runkle, 20 Ill. 448; Frank v. Peters, 9 Ind. 344; Dart v. Farmer's Bank, 27 Barb. 337; Fifield v. Gaston, 12 Iowa, 218; Miller v. Byran, 3 Iowa, 58; Palmer v. Henderson, 20 Ind. 297; Sisson v. Roath, 30 Conn. 15; Hutchinson v. Watkins, 17 Iowa, 475; Meixsell v. Williamson, 35 Ill. 529; Apperson v. Ford, 23 Ark. 746; Mills v. Haines, 3 Head, 332; Hamilton v. Staples, 34 Conn. 316; Leach v. Francis, 41 Vt. 670; Byrne v. Becker, 42 Mo. 264; Webster v. Folsom, 58 Me. 230; Lassiter v. Davis, 64 N. C. 498; Rose v. Coble, 1 Phil. 517; McCormick v. Hyatt, 33 Ind. 546; Durfee v. Pavitt, 14 Minn. 424; Merchants' Bank v. Newton, 22 N. J. Eq. 58; Parrish v. Danford, 1 Bond, 345; Reiger v. Davis, 67 N. C. 185; Ruhl v. Phillips, 48 N. Y. 125; Kyger v. Skirt Co. 34 Ind. 249; Lipperd v. Edwards, 39 Ind. 165; Smith v. Pate, 3 Rich. (N. S.) 204; Blake v. Sawin, 92 Mass. 340; Wilson v. Fuller, 9 Kans. 176; Diefendorf v. Oliver, 8 Kans. 365; Jenkins v. Einstein, 3 Biss. 128; Ackerman v. Smiley, 37 Tex. 211; Gentry v. Robinson, 55 Mo. 260; Herkelrath v. Stookey, 63 Ill. 486; Shearon v. Henderson, 38 Tex. 245; Preston v. Twiner, 36 Iowa, 671; Beadless v. Miller, 9 Bush. 405; Collins v. Cook, 40 Tex. 238; Trieber v. Andrews, 31 Ark. 163; Tompkins v. Nichols, 53 Ala. 199; First Nat'l Bank v. Irons, 28 N. J. Eq. 43; Hatch v. Jordan, 74 Ill. 414; Tootle v. Dunn, 6 Neb. 93; Johnston v. Field, 60 Ind. 377; Kellogg v. Aherin, 48 Iowa, 299; Keith v. Proctor, 8 Baxter, 189; Evans v. Nealis, 69 Ind.

fraudem creditorum factum sit, si tamen is qui cepit, ignoravit, cessare videntur verba edicti.[1]

GRANTEE WITHOUT CONSIDERATION NOT PROTECTED.—An inquiry into the good faith of the grantee is only necessary, however, when there is a valuable consideration for the transfer.[2] The mere acceptance of a transfer, without a valuable consideration, is of itself sufficient evidence of a participation in the debtor's fraudulent intent.[3] *Simili modo dicimus et si cui donatum est non esse quaerendum an sciente ei cui donatum gestum sit, sed hoc tantum an fraudentur creditores. Nec videtur injuria affici is qui ignoravit cum lucrum extorqueatur, non damnum infligatur. In hos tamen qui ignorantes ab eo qui solvendo non sit, liberalitatem acceperunt, hactenus actio erit danda, quatenus locupletiores facti sunt; ultra non.*[4] A creditor, however, who takes a transfer as security for or in payment of an antecedent debt is deemed to be a purchaser for a valuable consideration, and is within the protection of the proviso unless he has notice of or participates in some fraudulent intent on the part of the grantor.[5]

148; Tyberandt v. Raucke, 96 Ill. 71; Norris v. Persons, 49 Wis. 101; Smith v. Schmitz, 10 Neb. 600; Bradley v. Ragsdale, 64 Ala. 558; Florence S. M. Co. v. Zeigler, 58 Ala. 221; Morse v. Aldrich, 130 Mass. 578; State v. Tubessing, 6 Mo. Ap. 585.

[1] Dig. lib. 42, tit. 9, § 8; 1 Domat. B. 2, tit. 10.

[2] Newman v. Cordell, 43 Barb. 448; Wood v. Hunt, 38 Barb. 302; Peck v. Carmichael, 9 Yerg. 325; Gamble v. Johnson, 9 Mo. 605; Swartz v. Hazlet, 8 Cal. 118; Wise v. Moore, 31 Geo. 148; Clark v. Chamberlain, 95 Mass. 257; Hicks v. Stone, 13 Minn. 434; Lee v. Figg, 37 Cal. 328; Spaulding v. Blythe, 73 Ind. 93; Sherman v. Hogland, 73 Ind. 472; Martin v. Rexroad, 15 W. Va. 512; Pickett v. Pipkin, 64 Ala. 920.

[3] Belt v. Raguet, 27 Tex. 471.

[4] Dig. lib. 42, tit. 9, § 11; 1 Domat. B. 2, tit. 10.

[5] Dudley v. Danforth, 61 N. Y. 626; Archer v. O'Brien, 14 N. Y. Supr. 146; Coleman v. Smith, 55 Ala. 368; Beurmann v. Van Buren, 44 Mich. 496; Thompson v. Furr, 57 Miss. 478; Surget v. Boyd, 57 Miss. 485; Reehling v. Byers, 94 Penn. 316.

GOOD FAITH AS WELL AS A VALUABLE CONSIDERATION.—A transfer, however, made on a good consideration, if it is not also *bona fide* is not within the proviso The words of the proviso are "on a good consideration and *bona fide*." A transfer must therefore not only be on a good consideration, but also *bona fide*.[1] If a transfer is for a valuable consideration, the only question is whether it is *bona fide*.[2] On that point every case stands on its own merits. If it is not in good faith it is void, although the grantee pays a full consideration, for the law never allows one man to assist in cheating another.[3] The reason is manifest. Fraud may as readily be effected when a full and fair price is paid as when nothing is paid. A person may resolve not to pay his debts, and another knowing this may treat with him and purchase his whole estate at a fair and full price, and thus enable him to defeat the claims of his creditors. Although the purchaser gains no advantage, he enables the debtor to evade the payment of his debts, and the effect upon the creditors is precisely the

[1] Twyne's Case, 3 Co. 80; Moore, 638; Copis v. Middleton, 2 Madd. 410; Harrison v. Kramer, 3 Iowa, 543; Glenn v. Randall, 2 Md. Ch. 220; Wood v. Chambers, 20 Tex. 247.

[2] Hale v. Saloon Omnibus Co., 4 Drew, 492; s. c. 28 L. J. Ch. 777; Harman v. Richards, 10 Hare, 81; Holmes v. Penney, 3 K. & J. 90.

[3] Cadogan v. Kennett, 2 Cowp. 432; Worseley v. DeMattos, 1 Burr. 467; Devon v. Watts, Doug. 86; Wickham v. Miller, 12 Johns. 320; Stein v. Hermann, 23 Wis. 132; Pulliam v. Newberry, 41 Ala. 168; Chappel v. Clapp, 29 Iowa, 161; Harrison v. Jaquess, 29 Ind. 208; Sayre v. Fredericks, 16 N. J. Eq. 205; Carny v. Palmer, 2 Cold. 35; Weisiger v. Chisholm, 22 Tex. 670; s. c. 28 Tex. 780; Castro v. Illies, 22 Tex. 479; Gardinier v. Otis, 13 Wis. 460; Smith v. Culbertson, 9 Rich. 106; Barrow v. Bailey, 5 Fla. 9; Clark v. Wentworth, 6 Me. 259; Edrington v. Rogers, 15 Tex. 188; Robinson v. Holt, 39 N. H. 557; Duelly v. Van Houghton, 4 N. Y. Leg. Obs. 101; Johnston v. Dick, 27 Miss. 277; Johnson v. Sullivan, 23 Mo. 474; Rogers v. Evans, 3 Ind. 574; Borland v. Mayo, 8 Ala. 104; Shannon v. Commonwealth, 8 S. & R. 444; Johnson v. Brandis, 1 Smith, 263; Pettus v. Smith, 4 Rich. Eq. 197; Walcott v. Brander, 10

same as if nothing were paid.[1] As it is the intent to withdraw the debtor's property from the reach of his creditors that generally makes a transfer for full value fraudulent, a real exchange of a debtor's land for other land in the same neighborhood of equal value and equally secure in point of title, can not be deemed fraudulent and void as to the grantor's creditors, except under exceptional circumstances.[2]

NOTICE TO GRANTEE.—Notice makes a man a *mala fide* purchaser. It is *per se* evidence of *mala fides*.[3] If the grantee has notice of the debtor's fraudulent intent, the transfer is void without reference to his actual intent. The law in such case charges him with that guilty knowledge which makes him a participator in the fraud.[4] The words "without notice," in the proviso, however, are not applicable to the debt of the party making the transfer, but to "covin, fraud or collusion."[5] *Quod ait praetor sciente, accipimus te conscio et fraudem participante; non*

Tex. 419; Lowry v. Pinson, 2 Bailey, 324; Farmers' Bank v. Douglas, 19 Miss. 469; Watson v. Dickens, 20 Miss. 608; Moseley v. Gainer, 10 Tex. 393; Clements v. Moore, 6 Wall. 299; Peck v. Land, 2 Geo. 1; Cadbury v. Nolen, 5 Penn. 320; Ayres v. Moore, 2 Stew. 336; Zerbe v. Miller, 16 Penn. 488; Alexander v. Todd, 1 Bond, 175; Parrish v. Danford, 1 Bond, 345; Starin v. Kelly, 36 N. Y. Sup. 366; Fishel v. Ireland, 52 Geo. 632; Christian v. Greenwood, 23 Ark. 258; Ferris v. Irons, 83 Penn. 179; Brinks v. Heise, 84 Penn. 246; Randall v. Vroom, 30 N. J. Eq. 353; Gebhart v. Merfield, 51 Md. 322; White v. Perry, 14 W. Va. 66; Savage v. Hazard, 17 Neb. 323; Smith v. Muirhead, 34 N. J. Eq. 4; Singer v. Jacobs, 11 Fed. Rep. 559.

[1] Rea v. Alexander, 5 Ired. 644; Lowry v. Pinson, 2 Bailey, 324; Brown v. Foree, 7 B. Mon. 357; Kaine v. Weigley, 22 Penn. 179; Clements v. Moore, 6 Wall. 299.

[2] Ford v. Williams, 3 B. Mon. 550.

[3] Humphries v. Freeman, 22 Tex. 45.

[4] Hathaway v. Brown, 18 Minn. 414; Roeber v. Bowe, 33 N. Y. Supr. 554.

[5] Jones v. Boulter, 1 Cox, 288.

enim, si simpliciter scio illum creditores habere, hoc sufficit ad contendendum teneri in factum actione, sed si particeps fraudis est.[1] Mere knowledge of the debtor's insolvency,[2] or of a judgment,[3] or of a threatened attachment,[4] is not sufficient, unless the object of the debtor is to delay, hinder, or defraud his creditors, and this purpose is known to the grantee. Up to the day of the delivery of the writ to the sheriff the debtor may transfer his personal property, provided it is not a mere trick to evade an execution. But notice of a fraudulent intent on the part of the debtor will vitiate the transfer.

ACTUAL KNOWLEDGE NOT NECESSARY.—It is not necessary that the grantee shall have actual knowledge of the debtor's intent to delay, hinder, or defraud his creditors in order to render the transfer void. A knowledge of facts sufficient to excite the suspicions of a prudent man and to put him on the inquiry,[5] or to lead a person of ordinary perception to infer fraud,[6] or the means of knowing by the

[1] Dig. lib. 42, tit. 9.

[2] Atwood v. Impson, 20 N. J. Eq. 150; Hughes v. Monty, 24 Iowa, 499; Bridge v. Loeschigk, 42 N. Y. 426; s. c. 42 Barb. 171; Sisson v. Roath, 30 Conn. 15; Merchants' Bank v. Newton, 22 N. J. Eq. 58; Durkee v. Chambers, 57 Mo. 575.

[3] Beals v. Guernsey, 8 Johns. 446; Waterbury v. Sturtevant, 18 Wend. 353; Bunyard v. Seabrook, 1 F. & F. 321.

[4] Lyon v. Rood, 12 Vt. 233; Fisher v. Hall, 44 Mich. 493; *vide* Reinheimer v. Hemingway, 35 Penn. 432.

[5] Mills v. Howeth, 19 Tex. 257; Green v. Tantum, 19 N. J. Eq. 105; s. c. 21 N. J. Eq. 364; Atwood v. Impson, 20 N. J. Eq. 150; Jackson v. Mather, 7 Cow. 301; Smith v. Henry, 2 Bailey, 118; s. c. 1 Hill, 16; Avery v. Johann, 27 Wis. 246; Hopkins v. Langton, 30 Wis. 379; Hathaway v. Brown, 18 Minn. 414; Nicol v. Crittenden, 55 Geo. 497; Phillips v. Reitz, 16 Kans. 396; Burnham v. Brennan, 42 N. Y. Sup. 49; Massie v. Engart, 32 Ark. 251; State v. Ertel, 6 Mo. Ap. 6; Simms v. Morse, 2 Fed. Rep. 325.

[6] Johnson v. Brandis, 1 Smith, 263; Wright v. Brandis, 1 Ind. 336; De Witt v. Van Sickle, 29 N. J. Eq. 209.

use of ordinary diligence,[1] amounts to notice and is equivalent to actual knowledge in contemplation of law. The nature and circumstances of the transaction may sometimes be such as must apprise the grantee of its character and object. *Res ipse loquitor.*[2] If he has notice of facts sufficient to put him on the inquiry, he can not be deemed a *bona fide* purchaser.[3] But in order to affect him with constructive notice it is essential that he shall have a knowledge of facts and circumstances naturally and justly calculated to awaken suspicions of the fraudulent intent in the mind of a man of ordinary care and prudence, thus making it his duty to pause and inquire, and a wrong on his part not to do so before consummating the purchase.[4] If he has notice of such facts and circumstances, he is considered either to know the fraudulent intent, or to purposely omit to make those inquiries which an ordinarily cautious and prudent man in the same situation would make. And in either case he is chargeable with participation in the fraud. On this point it is material to ascertain whether he has notice that there are any creditors or not, for if he has not, he can not have notice of a fraudulent intent.[5] If he has notice that there are creditors, this in connection with other facts may be sufficient to affect him with notice of a fraudulent intent.[6] If the grantor and

[1] Humphries v. Freeman, 22 Tex. 45; Farmers' Bank v. Douglas, 19 Miss. 469; Foster v. Grigsby, 1 Bush, 86; Garahay v. Bayley, 25 Tex. (Supp.) 294. *Contra*, Seavy v. Dearborn, 19 N. H. 351; Brown v. Foree, 7 B. Mon. 357; Sterling v. Ripley, 3 Chand. 166.

[2] Smead v. Williamson, 16 B. Mon. 492; Holt v. Creamer, 34 N. J. Eq. 181.

[3] Goodenough v. Spencer, 2 N. Y. Supr. 509; De Witt v. Van Sickle, 29 N. J. Eq. 209; Singer v. Jacobs, 11 Fed. Rep. 559.

[4] Hopkins v. Langton, 30 Wis. 379.

[5] Erdhouse v. Hickenlooper, 2 Bond, 392; Hunt v. Hoover, 34 Iowa, 77.

[6] Peirce v. Merritt, 70 Mo. 275.

grantee are relatives or are intimate, this is a fact from which it may be inferred that the latter knows the former's financial condition.[1] The notice of the fraudulent intent in order to affect the grantee must exist prior to the completion of the sale.[2] Notice before the payment of the purchase money is sufficient.[3] If a note is given for the purchase money which is not negotiable, notice before the payment thereof is sufficient.[4] If the intent is known it is not material that the grantee is not apprised of the full extent of the debtor's fraudulent designs.[5] *Illud certe sufficit et si unum scit creditorem fraudari, caeteros ignoravit, fore locum actioni.*[6] But if he has no such notice, it is not necessary that he shall inquire into the motives of the grantor in making the sale.[7]

MOTIVES OF DEBTOR AND GRANTEE NEED NOT BE THE SAME.—It is not necessary that the debtor and the grantee shall be actuated by like motives to cheat and defraud the grantor's creditors. The motives and intentions of the debtor and grantee may be different.[8] If the grantee has notice at the time that the debtor is transferring his property to delay, hinder, or defraud his creditors, it will

[1] Alexander v. Todd, 1 Bond, 175; Thames v. Rembert, 63 Ala. 561; Dunlap v. Haynes, 4 Heisk. 476; Castro v. Illies, 22 Tex. 479; Smith v. Schwed, 9 Fed. Rep. 483; Burtus v. Tisdall, 4 Barb. 571.

[2] Gottberg v. O'Connor, 44 N. Y. Sup. 554.

[3] Parkinson v. Hanna, 7 Blackf. 400; Nicol v. Crittenden, 55 Geo. 497; Massie v. Engart, 32 Ark. 251; Florence S. M. Co. v. Zeigler, 58 Ala. 221; *vide* Parker v. Crittenden, 37 Conn. 148.

[4] Matson v. Melchor, 42 Mich. 477; Starin v. Kelly, 36 N. Y. Sup. 366; Arnholt v. Hartwig, 73 Mo. 485.

[5] Ruffing v. Tilton, 12 Ind. 259.

[6] Dig. lib. 42, tit. 9.

[7] Peirce v. Merritt, 70 Mo. 275.

[8] Bobb v. Woodward, 50 Mo. 95; Smith v. Henry, 1 Bailey, 118; S. C. 1 Hill, 16; Humphries v. Freeman, 22 Tex. 45; King v. Russell, 40 Tex. 124.

make the transfer void although he has no wish to defraud them, for the motive is imputed to him as a fraud in law, and makes him a *mala fide* purchaser. If, for instance, he purchases because he considers the property cheap, and this is the only motive that induces him to purchase, or because he desires to save a debt due to him by the grantor, the transfer is nevertheless fraudulent.[1] It has, however, been held that if the grantee has a connection with the property, and has reasons and motives for making the purchase entirely independent of the debtor's motives and purposes in wishing to sell, and which are both honest and adequate to every intent, and in exclusion of any intent or willingness to lend himself in aid of the debtor, the mere knowledge of the debtor's intent and purpose will not affect him as being a participant in the debtor's contemplated fraud, when he purchases for the preservation and promotion of his own business interest. The decision is placed upon the ground that such a purchaser is not a mere volunteer.[2] It must be considered, however, as going to the extreme verge of the law, and nothing but the most pressing exigencies could bring a case within this exception.

Co-operation.—It is not necessary that the grantee shall be one of the originators of the fraudulent scheme. Fraud may be imputed to a party either by co-operation in the original design or by constructive co-operation from notice of it and from carrying the design into operation with such notice. There is no difference between those who form the design and those who afterwards enter into it with a knowledge of its character and aid in carrying it

[1] Edgell v. Lowell, 4 Vt. 405; Fuller v. Sears, 5 Vt. 527.
[2] Root v. Reynolds, 32 Vt. 139.

out.[1] The grantee is also bound by the acts of his agent which he adopts and confirms,[2] and if they are fraudulent, his own innocence will not suffice to protect the transfer.

Sale to Pay Debts.—The notice to the grantee must be a notice of an intent on the part of the debtor to delay, hinder or defraud in the legal sense of those terms as used in the statute. The law, however, does not deprive even an insolvent man of the right to sell his property to pay his debts.[3] Where the necessary effect of a transfer is to secure the application of the full value of the property to the discharge of certain debts of the grantor in a manner satisfactory to the holders of those debts, the case is not distinguishable from that of a conveyance to the creditors themselves in discharge of real debts and at a fair price.[4] The right to prefer involves the right to sell with the intent to give a preference. Fraud does not consist in transferring property with a view to prefer one creditor to another, but in the intention to prefer one's self to all creditors.[5] Although a transfer is made with the intent to prevent the effect of a suit, it is not necessarily fraudulent and void if made also with intent to pay other creditors. A sale intended to supply the means of pay-

[1] Stovall v. Farmers' Bank, 16 Miss. 305.

[2] White v. Graves, 7 J. J. Marsh. 523; Wiley v. Knight, 27 Ala. 336; Pope v. Pope, 40 Miss. 516; Bobb v. Woodward, 50 Mo. 95; Clark v. Fuller, 39 Conn. 238; Lund v. Equitable Life A. Society, 31 N. J. Eq. 355; Radford v. Folsom, 3 Fed. Rep. 199.

[3] Wood v. Shaw, 29 Ill. 444; Lowry v. Howard, 35 Ind. 170; Eskridge v. Abrahams, 61 Ala. 134; Van Kleeck v. Miller, 19 N. B. R. 484.

[4] Ford v. Williams, 3 B. Mon. 550; Gregory v. Harrington, 33 Vt. 241; Brown v. Foree, 7 B. Mon. 357; Ocoee Bank v. Nelson, 1 Cold. 186; Ruhl v. Phillips, 48 N. Y. 125; Norteliffe v. Warburton, 4 De G. F. & J. 449; *vide* Cook v. White, 20 Cal. 598.

[5] Gregory v. Harrington, 33 Vt. 241; Bedell v. Chase, 34 N. Y. 386; Avery v. Eastes, 18 Kans. 505.

ing just debts is not fraudulent and void merely because it may also have been intended as a means of preventing one creditor from sacrificing the debtor's property, and thus defeating the collection or payment of other debts. The intent to delay certain creditors from the collection of their debts by the due course of law will not necessarily vitiate the sale, though known and so far concurred in by the vendee. If it is made also with the intent and as the means of paying other creditors or all creditors, and upon terms reasonably calculated to answer that purpose in a satisfactory manner and to the extent of the value of the property, it can not be condemned merely because it may have been intended by the vendor to obstruct some of the creditors in the legal coercion of their debts, although this intention may have been known to the vendee.[1]

Knowledge of Intent to Defeat an Execution.—If the grantee has reasonable grounds for supposing that the debtor intends the transfer as a means to pay some of his creditors, the mere knowledge that the debtor also intends to baffle and defeat others does not establish any notice of a fraudulent intent against him.[2] His knowledge of the debtor's intent to defeat some of his creditors affords, however, a presumption of a participation in an intent to hinder, delay or defraud them, and will authorize the conclusion that he did so participate unless the inference is repelled by the circumstances of the transaction.[3] The question is as to his own actual participation in a fraudulent scheme, and this is a question of fact. Although it may be inferred from his knowledge of the debtor's intent

[1] Brown v. Smith, 7 B. Mon. 361; Wood v. Shaw, 29 Ill. 444.
[2] Brown v. Foree, 7 B. Mon. 357.
[3] Kendall v. Hughes, 7 B. Mon. 368; Brown v. Foree, 7 B. Mon. 357.

to defeat some of his creditors, yet as there may be, and generally are, other and in different cases varying facts bearing upon the question of participation, it is inconsistent with the principles which regulate the investigation of mere facts, and the free inquiry after truth, to make the grantee's knowledge of such intent on the part of the debtor conclusive evidence of his participation in a fraudulent intent. This would be to stop in the inquiry before its real end is attained, to make a probable conclusion absolutely decisive of the question. His knowledge of an intent to defeat some creditors is a fact tending more or less strongly to prove a fraudulent participation on his part, but must be considered in connection with other facts in the determination of his actual motive and the true character of the transaction.[1]

VALIDITY AFFECTED BY DISPOSITION OF PROCEEDS.—The payment of a full consideration and the appropriation of it to the payment of creditors repel the presumption arising from the grantee's knowledge of the debtor's intent to defeat some of his creditors.[2] Where a part only is so appropriated a difficult point is presented,[3] but if it can be fairly assumed upon all the circumstances that, instead of expecting and intending that the price paid by him should be withheld from creditors, the grantee expected it to be paid to them, and did not make the purchase in order to defraud them, he can not be implicated in the fraud on the ground that he knew of the debtor's intent to thwart

[1] Brown v. Foree, 7 B. Mon. 357; Brown v. Smith, 7 B. Mon. 361.

[2] Kendall v. Hughes, 7 B. Mon. 368; Brown v. Foree, 7 B. Mon. 357; Johnson v. McGrew, 11 Iowa, 151; Uhler v. Maulfair, 23 Penn. 481; York County Bank v. Carter, 38 Penn. 446; *vide* Ashmead v. Hean, 13 Penn. 584; Lowry v. Pinson, 2 Bailey, 324.

[3] Ford v. Williams, 3 B. Mon. 550.

some of his creditors, and made the purchase without sufficiently guarding against a misapplication of the price. It would be too great a restriction upon the common business and traffic of men if every purchase from a debtor were to be conclusively invalidated because the proceeds are subsequently misapplied.[1] When a cloud, however, rests upon the disposition made by the debtor of the money, the *bona fides* of the grantee must be clearly shown.[2] If the circumstances are sufficient to put him on the inquiry, he must see to it, and know that the money is applied in payment of the grantor's debts, and can not rely upon the debtor's declaration of an intention to so apply it.[3] A deed may be fraudulent, even though it provides upon its face for the payment of all the debts due by the grantor,[4] or the grantee applies the purchase money to pay creditors.[5]

Good Faith affected by Amount of Consideration. It has been truly said that those who undertake to impeach for *mala fides* a transfer which has been made for a valuable consideration, have a task of great difficulty to discharge,[6] for the presumption is that it is fair and honest until the contrary is shown by evidence[7] sufficient for that purpose. The participation in the fraud may be shown by circumstances, without the production of direct evi-

[1] Brown v. Foree, 7 B. Mon. 357; Brown v. Smith, 7 B. Mon. 361; *vide* Clements v. Moore, 6 Wall. 299.

[2] Stanton v. Green, 34 Miss. 576; Bastein v. Dougherty, 3 Phila. 30; Alexander v. Todd, 1 Bond, 175.

[3] Avery v. Johann, 27 Wis. 246; Green v. Tantum, 19 N. J. Eq. 105; s. c. 21 N. J. Eq. 364.

[4] Drum v. Painter, 27 Penn. 148.

[5] Farmers' Bank v. Douglass, 19 Miss. 469.

[6] Harman v. Richards, 10 Hare, 81.

[7] Sibley v. Hood, 3 Mo. 290; Wilson v. Lott, 5 Fla. 305; Glenn v. Grover, 3 Md. 212; s.c. 3 Md. Ch. 29.

dence,[1] but the proof must be clear and convincing.[2] The amount and character of the consideration paid are material when the good faith of the transfer is put in controversy. A trifling consideration, merely to give color to the transaction, is not sufficient;[3] and, on the other hand, the property may sell below what might have been obtained by a careful sale.[4] An inadequate consideration, however, is a badge of fraud, and is not sufficient to support a transfer whose good faith is otherwise impeached.[5] If the transfer is in other respects fair and legal, time may be allowed for the payment of the purchase money,[6] but in such case it is the duty of the vendee to show that it is afterwards paid, and that the stipulation for credit was made in good faith.[7]

CONVEYANCE TO USE OF GRANTOR.—It is enacted by 3 H. VII, c. 4, that all deeds of gift of goods and chattels,

[1] Anderson v. Tydings, 3 Md. Ch. 167.

[2] Terrell v. Green, 11 Ala. 207.

[3] Michael v. Gay, 1 F. & F. 409; Monell v. Scherrick, 54 Ill. 269; Galbraith v. Cook, 30 Ark. 417; Smart v. Harring, 52 How. Pr. 505.

[4] Hale v. Saloon Omnibus Co., 4 Drew, 492; s. c. 28 L. J. Ch. 777; Stovall v. Farmers' Bank, 16 Miss. 305.

[5] Kaine v. Weigley, 22 Penn. 179; Trimble v. Ratcliff, 9 B. Mon. 511; s. c. 12 B. Mon. 32; Robinson v. Robards, 15 Mo. 459; Lee v. Hunter, 1 Paige, 519; Barrow v. Bailey, 5 Fla. 9; Arnold v. Bell, 1 Hayw. 396; Seaman v. White, 8 Ala. 656; State v. Evans, 38 Mo. 150; Durkee v. Mahoney, 1 Aik. 116; Kuykendall v. McDonald, 15 Mo. 416; Bryant v. Kelton, 1 Tex. 415; Bozman v. Draughan, 3 Stew. 243; *vide* Union Bank v. Toomer, 2 Hill Ch. 27; Nunn v. Wilsmore, 8 T. R. 521; Grogan v. Cooke, 2 Ball. & B. 233; Middlecome v. Marlow, 2 Atk. 519; Penhall v. Elwin, 1 Sm. & Gif. 258; Blount v. Doughty, 3 Atk. 481; Thompson v. Webster, 7 Jur. (N. S.) 531; s. c. 9 W. R. 641; 4 De G. & J. 600; 4 Drew, 628; 4 L. T. (N. S.) 750; Copis v. Middleton, 2 Madd. 410; Wright v. Stannard, 2 Brock. 311; Worthy v. Caddell, 76 N. C. 82.

[6] O'Neil v. Orr, 5 Ill. 1; Starin v. Kelly, 36 N. Y. Sup. 366; Alexander v. Todd, 1 Bond, 175.

[7] Kaine v. Weigley, 22 Penn. 179.

made or to be made, of trust, to the use of that person or persons that made the same deed of gift, be void and of none effect. The statute is limited to goods and chattels, but the principle is a part of the common law and applies to realty as well as personalty.[1] It is analogous to that of 27 H. VIII, c. 10, in its purpose; but it goes further, and makes the whole transfer void. It is not directed against trusts made with fraudulent intent, but against trusts themselves. There is not one word about intent, or object, or purpose; or excluding, injuring, or delaying creditors. The effect of the trust is not a subject for consideration. Its mere existence avoids the transfer and destroys the title as against creditors existing or subsequent. A conveyance by the owner of property to another, in trust for himself, is, in effect, a conveyance to himself, and such a measure can never be necessary for any legal or honest purpose. He who, having the full title, desires to retain the control and use of his property, and yet transfer it to another, can, in the general course of human actions, have but one motive for that measure, and that motive must be to defeat or elude the claims of others. Hence all conveyances to the use of the grantor are fraudulent and null against creditors and others having just claims upon the grantor or upon the property conveyed. In all the refinements of uses and trusts, in the midst of multiplied distinctions between legal and equitable interests which have abounded in the progress of Anglican jurisprudence, this principle has never been doubted, and the mockery of a transfer by a debtor of his property, to be held for the use of the debtor, has never been allowed to defeat the rights or remedies of creditors.[2]

[1] Sandlin v. Robbins, 62 Ala. 477.

[2] Curtis v. Leavitt, 15 N. Y. 9; s. c. 17 Barb. 309; Sandlin v. Robbins, 62 Ala. 477.

OBJECT OF THE STATUTE.—The true name of this statute is, a statute of personal uses. Its object is to render simply ineffectual purely nominal transfers of personal estate where the entire use and control are, by a declaration of trust in or out of the instrument, left in him who makes the transfer. It is founded upon the self-evident principle that a man's property should pay his debts, although he has vested a nominal title in some other person. For that purpose the statute declares the title to be in the debtor, and no transfer which is merely nominal can stand in the way. It has no reference to intention, whether fraudulent or honest. There may be, in fact, no creditors until long after the transaction, but if the debtor has property they are entitled to be paid. The simple inquiry is, whether the property belongs to the debtor, not upon a theory of fraud and against his conveyance, but upon a theory of equitable title reserved to himself by the very conveyance which transfers the legal and nominal title to another.[1]

RESULTING TRUSTS.—The statute, however, has no application to cases of real and actual alienation upon a valuable consideration and for active and real purposes, although incidental benefits are reserved to the grantor. It is the transfer to the use of the grantor that is void, and not a transfer to other uses and for other purposes.[2] The distinction is between mere passive trusts for the grantor's benefit, and those trusts which result from alienation for real active purposes in the course of business. Reservations for the benefit of the grantor, in and of themselves,

[1] Curtis v. Leavitt, 15 N. Y. 9; s. c. 17 Barb. 309; Sturdivant v. Davis, 9 Ired. 365.

[2] Shoemaker v. Hastings, 61 How. Pr. 79.

are perfectly innocuous. A man proposing to create a security upon his estate, or to assign it upon any trust, has a plain right in general to reserve to himself just such interests and benefits as he and those with whom he is dealing can agree upon. The law upon this subject is entirely adapted to the dealings of mankind. In the business of every trader exigencies will arise requiring a pledge, mortgage, or some other assurance less than an absolute sale, founded upon some actual dealing the very nature of which implies that some residuary or partial interest remains. Such instruments must, in the very necessity of things, take effect according to their terms, and the law therefore gives them effect. If the only object of the conveyance or assignment is to secure the payment of a loan of money, or of an existing debt, and the express reservation or resulting of the residuary beneficial interest in the property is a necessary incident of the conveyance in trust, and not one of its objects, the rule does not apply. In all cases of a mortgage, whether created in the form of a trust or otherwise, the mortgagee acquires only a specific lien on the property transferred, and the whole residuary interest therein remains in or results, by implication of law, to the grantor, and an express reservation of such residuary interest being nothing more than what results to the party by operation of law, will not vitiate the assignment, for the mere expression of a trust where the law implies one, if not expressed, can not of itself avoid a conveyance otherwise good. *Expressio eorum quæ tacite insunt nihil operatur.* It cannot be unlawful to stipulate for that which the law provides. The expression of a trust, therefore, to restore the thing mortgaged or pledged to the mortgagor or pledgor, or to return the surplus after the payment of the debt, is not obnoxious to the statute, unless it also

appears that the trust will operate to the prejudice and injury of creditors.[1] As the grantor may expressly provide for the trust which would result by operation of law, it follows that he may in good faith direct that it shall be given to another.[2]

WHAT BENEFITS MAY BE RESERVED.—There are open trusts which may be reserved upon the face of the deed,[3] as, for instance, a life interest,[4] or a purchase in the joint names of the grantor and grantee.[5] In the case of mortgages it is customary to stipulate that the mortgagor shall have the control and benefit of the estate until forfeiture.[6] A stipulation may also be inserted that the mortgagor may retain possession until the mortgagee requires a sale.[7] A

[1] Curtis v. Leavitt, 15 N. Y. 9; s. c. 17 Barb. 309; Ravisies v. Alston, 5 Ala. 297; Eaton v. Perry, 29 Mo. 96; Leavitt v. Blatchford, 17 N. Y. 521; Dunham v. Whitehead, 21 N. Y. 131; Kneeland v. Cowles, 4 Chand. 46; McClelland v. Remsen, 36 Barb. 622; s. c. 14 Abb. Pr. 331; s. c. 23 How. Pr. 175; Phillips v. Zerbe Run Co., 25 Penn. 56; Johnson v. Cunningham, 1 Ala. 249; Pope v. Wilson, 7 Ala. 690; Malone v. Hamilton, Minor, 286; Howell v. Bell, 29 Mo. 135; Brinley v. Spring, 7 Me. 241; Rahn v. McElrath, 6 Watts, 151; Burgin v. Burgin, 1 Ired. 453; Austin v. Johnson, 7 Humph. 191; Tunnell v. Jefferson, 5 Harring. 206; s. c. 2 Del. Ch. 135; Stanley v. Robins, 36 Vt. 422; Godchaux v. Mulford, 26 Cal. 316; Bartels v. Harris, 4 Me. 146; Hindman v. Dill, 11 Ala. 689; Leitch v. Hollister, 4 N. Y. 211; Van Buskirk v. Warren, 39 N. Y. 119; s. c. 34 Barb. 457; s. c. 13 Abb. Pr. 145; 4 Abb. Ap. 457; Stevens v. Bell, 6 Mass. 339; Smyth v. Ripley, 33 Conn. 306; Vallance v. Miners' Ins. Co., 42 Penn. 441; Lay v. Seaye, 47 Ala. 82; Galloway v. People's Bank, 54 Geo. 441; Morgan v. Bogue, 7 Neb. 429; Camp v. Thompson, 25 Minn. 175; *vide* Wilson v. Cheshire, 1 McCord Ch. 233.

[2] Green v. Tanner, 49 Mass. 411. [3] Low v. Carter, 21 N. H. 433.

[4] Lott v. De Graffenreid, 10 Rich. Eq. 346; Adams v. Broughton, 13 Ala. 731.

[5] Christ's Hospital v. Budgin, 2 Vern. 683; Kingdome v. Bridges, 2 Vern. 67.

[6] Graham v. Lockhart, 8 Ala. 9; Wilson v. Russell, 13 Md. 494.

[7] Dubose v. Dubose, 7 Ala. 235; Brock v. Headen, 13 Ala. 370; Marriott v. Givens, 8 Ala. 694; Cheatham v. Hawkins, 76 N. C. 335.

stipulation that the grantee shall employ the debtor's apprentices is merely collateral, and does not vitiate the transaction.[1] No man, however, is allowed to make a conveyance reserving the profits and income to himself for life, with a power to direct what disposition shall be made of the property after his death. He can not be the equitable owner of property and still have it exempt from his debts.[2] If the grantor is insolvent, the reservation of even a life interest in the property will make the whole transfer void.[3]

SECRET TRUSTS.—No conveyance is deemed *bona fide* within the proviso which is accompanied with any secret trust.[4] It matters not how this secret trust is created or expressed, or whether it is express or implied.[5] It may either affect the whole transfer, or constitute only a part of the consideration for it. For instance, if a man is indebted to five several persons in the several sum of £20, and has goods of the value of £20, and makes a conveyance of all his goods to one of them, in satisfaction of his debt, but there is a trust that he shall deal favorably with him in regard to his poor estate, either to permit the grantor or some other for him, or for his benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able, this is not *bona fide* within the proviso.[6] The secret trust which is illustrated by this

[1] Faunce v. Lesley, 6 Penn. 121.

[2] Mackarson's Appeal, 42 Penn. 330; Coolidge v. Melvin, 42 N. H. 510; Brinton v. Hook, 3 Md. Ch. 477; Ford v. Caldwell, 3 Hill (S. C.) 248; Hunters v. Waite, 3 Gratt. 26; Watts v. Thomas, 2 P. Wms. 364.

[3] Young v. Heermans, 66 N. Y. 374; Sandlin v. Robbins, 62 Ala. 477.

[4] Twyne's Case, 3 Co. 80; s. c. Moore, 638.

[5] Rice v. Cunningham, 116 Mass. 466; Coolidge v. Melvin, 42 N. H. 510.

[6] Twyne's Case, 3 Co. 80; s. c. Moore, 638.

example is manifestly a trust which makes the transfer merely colorable. In cases of this kind the question is, whether the transfer is intended in good faith to have operation in favor of the grantee, and to confer upon him a right to be exercised at his pleasure over the property, or is a mere sham, executed colorably, and only for the purpose of protecting the debtor, and without any real intention to convey the property to the grantee. If it is real, it is valid; if it is merely colorable, it is void.[1]

The secret trust need not, however, affect the whole transfer, or even attach itself in some way to the property. If it merely constitutes a part of the consideration, that is sufficient. If any secret, substantial advantage is secured to the debtor from the use of the property, or from its proceeds, this constitutes a secret trust.[2] If, for instance, there is a secret trust to support the debtor,[3] or to allow him to sell the property as agent for the grantee and have all that he can make beyond the actual cost,[4] this is such an interest as is utterly inconsistent with good faith in the transfer. The purchaser appears to be the exclusive owner, and the rights of the debtor rest in mere personal confidence between the parties and depend upon the pleasure of the creditor. It is this circumstance that constitutes the fraud, because the debtor expects a profit or

[1] Eveleigh v. Purrsford, 2 Mood. & Rob. 539; Sydnor v. Gee, 4 Leigh, 535; Coburn v. Pickering, 3 N. H. 415; Beers v. Botsford, 13 Conn. 146; Michael v. Gay, 1 F. & F. 409; Claytor v. Anthony, 6 Rand. 285; New England Marine Ins. Co. v. Chandler, 16 Mass. 275; Rea v. Alexander, 5 Ired. 644; Hinton v. Curtis, 1 Pitts. L. J. 198; Leadman v. Harris, 3 Dev. 144; Sturdivant v. Davis, 9 Ired. 365; Grant v. Lewis, 14 Wis. 487; Luff v. Horner, 3 F. & F. 480; Dewey v. Bayntun, 6 East. 257; Power v. Alston, 93 Ill. 587.

[2] Rice v. Cunningham, 116 Mass. 466; Coburn v. Pickering, 3 N. H. 415.

[3] Rice v. Cunningham, 116 Mass. 466; Franklin v. Claflin, 49 Md. 24.

[4] Grant v. Lewis, 14 Wis. 487.

benefit to himself from such pleasure and favor of the grantee while his creditors can not reach that interest in any way.[1] It is however essential that the reservation shall be a reservation of some substantial interest. A mere parol agreement, for instance, that the debtor may repurchase the property whenever he is able, will not vitiate the transfer if no substantial interest is thereby reserved.[2] The agreement furnishes evidence tending to show that the property is of greater value than the sum paid, and that there is a secret trust to that extent for the benefit of the grantor, but evidence may be received to show that the grantee paid the full value of the property present and prospective, and thus to rebut the inference of a secret trust to the prejudice of creditors, because the reservation was of nothing that was of value to them. But if a substantial interest is thereby reserved it renders the transfer void.[4]

Right of Possession as a Consideration.—A full consideration may be given in such a form as to defeat creditors, and thus render a transfer void.[5] The law, for instance, will not permit a debtor in failing circumstances to sell his property, convey it by deed without any reservation, and yet secretly reserve to himself the right to possess and occupy it for a limited time for his own benefit. Such a transfer lacks the element of good faith, for, while it professes to be an absolute conveyance upon its

[1] Hawkins v. Alston, 4 Ired. Eq, 137.

[2] Albee v. Webster, 16 N. H. 362; Newsom v. Roles, 1 Ired. 179; Glenn v. Randall, 2 Md. Ch. 220; Anderson v. Fuller, 1 McMullan Ch. 27; Barr v. Hatch, 3 Ohio, 527; McCully v. Shackhamer, 4 Neb. 438.

[3] Albee v. Webster, 16 N. H. 362.

[4] Albee v. Webster, 16 N. H. 362; Towle v. Hoitt, 14 N. H. 61.

[5] Bott v. Smith, 21 Beav. 511.

face, there is a concealed agreement between the parties to it inconsistent with its terms, securing a benefit to the grantor at the expense of those he owes. A trust thus secretly created, whether so intended or not, is a fraud on creditors, because it places beyond their reach a valuable right, and gives to the debtor the beneficial enjoyment of what rightfully belongs to his creditors.[1]

Collusion.—If there is any collusion for the benefit of the debtor the transfer is void. A note given as a fictitious consideration, or secretly as a part of the consideration, so that the debtor may control it for his own use,[3] is a fraud upon the creditors, and renders the transaction covinous.

Purchaser's Bounty.—It is not, however, every benefit conferred upon a debtor that renders a transfer fraudulent, but only such as are given in prejudice of the legal rights of creditors. Strict and inexorable as the law is upon the subject of frauds, it does not require that a purchaser shall either ignore or abrogate the impulses of natural affection, or of sympathy towards the unfortunate. If the transfer is valid and in good faith, there is no principle of the common law or construction of the statute

[1] Lukins v. Aird, 6 Wall. 78; Macomber v. Peck, 39 Iowa, 351; Carter v. Happel, 49 Ala. 539; Lang v. Stockwell, 55 N. H. 561; Sims v. Gaines, 64 Ala. 392; Edwards v. Stinson, 59 Geo. 443; Mitchell v. Stetson, 64 Geo. 442; Barber v. Tirrell, 54 Geo. 146; Scott v. Hartman, 26 N. J. Eq. 89; Sparks v. Mark, 31 Ark. 666; Guffin v. First Nat'l Bank, 74 Ill. 259; Moore v. Wood, 100 Ill. 451; Dean v. Skinner, 42 Iowa, 418; Fellows v. Lewis, 65 Ala. 343; *vide* Oriental Bank v. Haskins, 44 Mass. 332; St. John v. Camp, 17 Conn. 222; Howe Machine Co. v. Claybourn, 6 Fed. Rep. 438.

[2] Rea v. Alexander, 5 Ired. 644.

[3] Platt v. Brown, 33 Mass. 553; Pettibone v. Stevens, 15 Conn. 19; Bentz v. Riley, 69 Penn. 71.

which prevents the grantee from aiding the debtor or his family,[1] or disposing of his own as he pleases.

TRANSFER MUST BE UNCONDITIONAL.—The contract by which an insolvent debtor parts with his property must be absolute and unconditional. Consequently, if he retains the right to revoke the contract and resume the ownership of the property, the power is inconsistent with a fair, honest and absolute transfer, and renders it fraudulent and void.[2] A stipulation that the vendee may return the property whenever he chooses, and annul the contract before the purchase money is paid, is, for the same reason, fraudulent. It is not an unconditional sale, and does not vest the title absolutely in any one for a good consideration.[3]

SUPPORT OF DEBTOR.—An agreement to support the debtor or his family is a valuable consideration, but is not sufficient to uphold a transfer when the grantor is insolvent.[4] The transaction is equally fraudulent if enough

[1] Dallam v. Renshaw, 26 Mo. 533; Pinkston v. McLemore, 31 Ala. 308; Compton v. Perry, 23 Tex. 414; Ocoee Bank v. Nelson, 1 Cold. 186; Bumpas v. Dotson, 7 Humph. 310; Stuck v. Mackey, 4 W. & S. 196; Cureton v. Doby, 10 Rich. Eq. 411; Webb v. Roff, 9 Ohio St. 430; Young v. Dumas, 39 Ala. 60; Kilby v. Haggin, 3 J. J. Marsh. 208; Young v. Stallings, 5 B. Mon. 307; Winch v. James, 68 Penn. 297; Carter v. Happel, 49 Ala. 539; Thorpe v. Beavans, 73 N. C. 241.

[2] West v. Snodgrass, 17 Ala. 549; Bethel v. Stanhope, Cro. Eliz. 810; Anon. Dyer, 295, a; Rex v. Nottingham, Lane, 42; Tarback v. Marbury, 2 Vern. 510; Peacock v. Monk, 1 Ves. Sr. 127; Jenkyn v. Vaughan, 3 Drew, 419; S. C. 25 L. J. Ch. 338; Rock v. Dade, May on Fraud, 519; Fisher v. Henderson, 8 N. B. R. 175; Donovan v. Dunning, 69 Mo. 436; *vide* Sagitary v. Hide, 2 Vern. 44.

[3] Shannon v. Commonwealth, 8 S. & R. 444; West v. Snodgrass, 17 Ala. 549.

[4] Albee v. Webster, 16 N. H. 362; Church v. Chapin, 35 Vt. 223; Gunn v. Butler, 35 Mass. 248; Geiger v. Welsh, 1 Rawle, 349; Jackson v. Parker, 9 Cow. 73; Robinson v. Stewart, 10 N. Y. 189; Smith v.

is not left for the payment of the grantor's debts.[1] It is, in effect, a transfer to the use of the grantor, which is always void.[2] The gist of the objection consists, not in the amount to be paid in future support, but in the fact that the promise of future support forms part of the consideration as an inducement to the transfer. When it is shown that the present consideration is inadequate to satisfy his debts, whatever may be the amount secured to the debtor, the law, instead of entering upon the task of determining what part of the consideration is in money or other property, and what part is agreed to be paid in future support of the grantor, and holding the grantee responsible to creditors for the latter sum, treats the conveyance as a nullity as between the grantee and the creditors, and holds the property liable for their claims.[3] Evidence may, however, be given to show that the grantee paid the full value for the property, and that the reservation of a right to future support is of no value to creditors,

Smith, 11 N. H. 459; Russell v. Hammond, 1 Atk. 14; Stokes v. Jones, 18 Ala. 734; s. c. 21 Ala. 731; Sturdivant v. Davis, 9 Ired, 365; Crane v. Stickles, 15 Vt. 253; Bott v. Smith, 21 Beav. 511; Morrison v. Morrison, 49 N. H. 69; Rollins v. Mooers, 25 Me. 192; Webster v. Withey, 25 Me. 326; Johnston v. Harvy, 2 Penna. 82; Stanley v. Robbins, 36 Vt. 422; Miner v. Warner, 2 Phila. 124; s. c. 2 Grant, 448; Hawkins v. Moffatt, 10 B. Mon. 81; Henderson v. Downing, 24 Miss. 106; Robinson v. Robards, 15 Mo. 459; Knox v. Hunt, 34 Miss. 655; McLean v. Button, 19 Barb. 450; Coolidge v. Melvin, 42 N. H. 510; Graham v. Rooney, 42 Iowa, 567; Todd v. Monell, 26 N. Y. Supr. 362; Henry v. Hinman, 85 Minn. 199; Tupper v. Thompson, 26 Minn. 385; Stearns v. Gage, 79 N. Y. 102.

[1] Crane v. Stickles, 15 Vt. 253; Jones v. Spear, 21 Vt. 426; Tyner v. Somerville, 1 Smith, 149; Annis v. Bonar, 86 Ill. 128; Egery v. Johnson, 70 Me. 258; Graves v. Blondell, 70 Me. 190; Woodward v. Wyman, 53 Vt. 645.

[2] Cadogan v. Kennett, Cowp. 432; Anon. Dyer, 295, a; Adams v. Adams, 1 Dane Ab. 636.

[3] Sidensparker v. Sidensparker, 52 Me. 481; Egery v. Johnson, 70 Me. 258; Graves v. Blondell, 70 Me. 190; Moore v. Wood, 100 Ill. 451.

for they can not complain if the grantee assumes burdens which are not to their prejudice.[1] An agreement under the same circumstances may also be made to employ the grantor.[2]

SUPPORT BY SOLVENT PERSON.—If the grantor is free from debt,[3] or retains property amply sufficient for the payment of all his debts,[4] he has a right to contract for his future support for a longer or shorter period, accordingly as he may deem best, for the owner of property can dispose of it as he thinks proper, if he does no wrong to his creditors.

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[1] Slater v. Dudley, 35 Mass. 373; Albee v. Webster, 16 N. H. 362; Howe Machine Co. v. Claybourn, 6 Fed. Rep. 458.

[2] Griffin v. Cranston, 10 Bosw. 1; s. c. 1 Bosw. 281.

[3] Buchanan v. Clark, 28 Vt. 799; Mills v. Mills, 3 Head, 705; Mahony v. Hunter, 30 Ind. 246; Usher v. Hazletine, 5 Me. 471; Tibbals v. Jacobs, 31 Conn. 428; Hennon v. McClane, 88 Penn. 219.

[4] Hapgood v. Fisher, 34 Me. 407; Drum v. Painter, 27 Penn. 148; Johnston v. Zane, 11 Gratt. 552; Eaton v. Perry, 29 Mo. 96; Barrow v. Bailey, 5 Fla. 9; Wooten v. Clark, 23 Miss. 75; Parker v. Nichols, 24 Mass. 111; Johnson v. Johnson, 44 Mass. 63; Matthews v. Jordan, 88 Ill. 602.

CHAPTER IX.

CONSIDERATION.

WHAT IS A GOOD CONSIDERATION.—An inquiry into the consideration upon which a transfer is founded sometimes becomes important, because there are circumstances under which a debtor is not permitted to give away his property, and, also, because only those who give a good consideration are protected when there is a fraudulent intent on the part of the grantor. The statute protects all estates and interests which are conveyed on a good consideration, and *bona fide*, but inasmuch as others may lose their debts, which are things of value, the intent of the act is that the consideration shall be valuable, for equity requires that a transfer which defeats others shall be made on as high and good consideration as the things which are thereby defeated. Good consideration, therefore, is construed to mean a valuable consideration as between creditors and others claiming under the debtor.[1]

WHEN A TRANSFER IS VOLUNTARY.—A voluntary conveyance is a transfer without any valuable consideration. In determining whether a transfer is voluntary, the adequacy of the consideration does not enter into the question. The character of purchase or voluntary is determined by

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[1] Twyne's Case, 3 Co. 80; s. c. Moore, 638; Cunningham v. Dwyer, 23 Md. 219; Killough v. Steele, 1 Stew. & Port. 262; Taylor v. Jones, 2 Atk. 600; Partridge v. Gopp, 1 Eden, 163; s. c. Ambl. 596; Thomson v. Dougherty, 12 S. & R. 448.

the fact whether anything valuable passes between the parties.[1] As a general rule, a transfer is voluntary when it is founded upon a consideration which the law does not recognize as valuable, or is made in pursuance of an agreement which can not be enforced, for where there is no remedy there is no right.[2] An illegal consideration is, in contemplation of law, no consideration, and is not, therefore, sufficient to support a transfer as against creditors.[3] A parol agreement to make a gift does not vest any right in the donee, either legal or equitable, for it can not be enforced; consequently, a transfer in pursuance of such an agreement only takes effect, as against creditors, from the time when the transfer is actually made.[4] But if a voluntary deed is executed at a time when the grantor has no interest, and he subsequently acquires an interest, the transfer takes effect from the date of the deed.[5] A transfer which the law would compel a party to make is not voluntary.[6] If there has been a part performance of a contract that is within the statute of frauds, a conveyance in pursuance of the contract is valid.[7]

STATUTORY DEFENSE MAY BE WAIVED.—To the proposition that a conveyance in pursuance or in consideration of

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[1] Jackson v. Peek, 4 Wend. 300; Shontz v. Brown, 27 Penn. 123; Washband v. Washband, 27 Conn. 424.

[2] Spurgeon v. Collier, 1 Eden, 55; Planck v. Schermerhorn, 3 Barb. Ch. 644; Penhall v. Elwin, 1 Sm. & Gif. 258; Goldsmith v. Russell, 5 De G. M. & G. 547.

[3] Weeks v. Hill, 38 N. H. 199; Jose v. Hewitt, 50 Me. 248; Weeden v. Bright, 3 W. Va. 548.

[4] Rucker v. Abell, 8 B. Mon. 566; Davis v. McKinney, 5 Ala. 719; Hoye v. Penn, 1 Bland, 28; s. c. 2 H. & J. 477; Worthington v. Bullitt, 6 Md. 172; s. c. 3 Md. Ch. 99; Hubbard v. Allen, 59 Ala. 283.

[5] Bonny v. Griffith, Hayes, 115. [6] Buie v. Kelly, 5 Ired. 169.

[7] Van Bibber v. Mathis, 52 Tex. 406; Patterson v. McKinney, 97 Ill. 41.

an agreement which can not be enforced is voluntary, there is one exception. Wherever there is a moral obligation, which can not be enforced on account of the provisions of a statute, there the party may waive the benefit of the statute, and the transfer will be valid as against creditors. Thus, a debt which is barred by the statute of limitations,[1] or a discharge in bankruptcy,[2] is a good consideration for a conveyance. The statute of frauds is a defense which the debtor may waive, and if he does so, a conveyance in consideration of a claim that is within the statute will be valid.[3] If he receives the title to land which is paid for by another, upon a promise to hold it for the latter, he has the right to perform the promise and convey it to the real owner.[4] If the title to property is improperly taken in his name, he may convey it to the real owner,[5] or to a trustee for his benefit,[6] for the purpose of

[1] Sayre v. Fredericks, 16 N. J. Eq. 205; Keen v. Kleckner, 42 Penn. 529; Updike v. Titus, 13 N. J. Eq. 151; Shearon v. Henderson, 38 Tex. 245; French v. Motley, 63 Me. 326; Hale v. Stewart, 14 N. Y. Supr. 591; Brookville Nat'l Bank v. Trimble, 76 Ind. 195; *vide* Crawford v. Carper, 4 W. Va. 56.

[2] Wilson v. Russell, 13 Md. 494.

[3] Goff v. Rogers, 71 Ind. 459; Brown v. Rawlings, 72 Ind. 505; Creswell v. McCaig, 11 Neb. 222; First Nat'l Bank v. Bertschy, 52 Wis. 438; Livermore v. Northrup, 44 N. Y. 107; Stowell v. Hazlett, 57 N. Y. 635.

[4] Hyde v. Chapman, 33 Wis. 391; Sackett v. Spencer, 65 Penn. 89; City Nat'l Bank v. Hamilton, 34 N. J. Eq. 158; Gallman v. Perrie, 47 Miss. 131; First Nat'l Bank v. Dwelley, 72 Me. 223; Norton v. Mallory, 63 N. Y. 434; s. c. 8 N. Y. Supr. 499; s. c. 3 T. & C. 640; Ocean Nat'l Bank v. Hodges, 16 N. Y. Supr. 161; Dygert v. Remerschnider, 32 N. Y. 629; s. c. 39 Barb. 417; Baldwin v. Ryan, 3 T. & C. 251; Van Kleeck v. Miller, 19 N. B. R. 484; Holden v. Burnham, 5 T. & C. 195; *vide* Smith v. Lane, 20 Mass. 205.

[5] Seeders v. Allen, 98 Ill. 468; City Nat'l Bank v. Hamilton, 34 N. J. Eq. 158; McConnell v. Martin, 52 Ind. 454; Harlen v. Watson, 63 Ind. 143; Garrity v. Haynes, 53 Barb. 596; Bancroft v. Curtis, 108 Mass. 47; Parton v. Gates, 41 Ind. 456; Summers v. Hoover, 42 Ind. 153.

[6] McLaurie v. Partlow, 53 Ill. 340; Garrity v. Haynes, 53 Barb. 596.

correcting the mistake, whether a trust could be enforced in his favor or not. When a parol partition has been made of land, and each party has carried it out by taking possession of the part allotted to him, a deed may subsequently be made in pursuance of it.[1] The moral obligation resting upon the grantee holding under a fraudulent transfer is sufficient to support a reconveyance against his creditors.[2] Property which has been conveyed to a party to give him the necessary qualification to hold an office, may be reconveyed.[3] A transfer in consideration of a parol ante-nuptial contract is not within the foregoing exception, and is merely voluntary.[4] A debt which has been discharged by the voluntary release of the creditor is not a good consideration as against other creditors.[5] The law thus makes a distinction between a release by a statute and a release by the voluntary act of the party. An objection to receiving parol evidence can not arise when the party bound by the agreement has acted on it in good faith.[6] A Confederate note was a valuable consideration if the parties and the property were at the time within the Confederate lines.[7]

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[1] Bilsborrow v. Titus, 15 How. Pr. 95.

[2] Clark v. Rucker, 7 B. Mon. 583; Davis v. Graves, 29 Barb. 480; Stanton v. Shaw, 3 Baxter, 12; Caffal v. Hale, 49 Iowa, 53; Petty v. Petty, 31 N. J. Eq. 8. *Contra*, Susong v. Williams, 1 Heisk. 625; Chapin v. Pease, 10 Conn. 69; Allison v. Hagan, 12 Nev. 38; Maher v. Bovard, 14 Nev. 324.

[3] Jackson v. Ham, 15 Johns. 261; Robert v. Gibson, 6 H. & J. 116.

[4] Warden v. Jones, 2 De G. & J. 76; s. c. 17 L. J. Ch. 190; Dundas v. Dutens, 2 Cox, 235; s. c. 1 Ves. Jr. 196; Spurgeon v. Collier, 1 Eden, 55; Murphy v. Abraham, 15 Ir. Eq. (N. S.) 371; Reade v. Livingston, 3 Johns. Ch. 481; Randall v. Morgan, 12 Ves. 67; Smith v. Greer, 3 Humph. 118; Hayes v. Jones, 2 Pat. & H. 583; Andrews v. Jones, 10 Ala. 400; Wood v. Savage, 2 Doug. (Mich.) 316; s. c. Walk. Ch. 471.

[5] King v. Moore, 35 Mass. 376; Nightingale v. Harris, 6 R. I. 321.

[6] Jones v. Ruffin, 3 Dev. 404. [7] McDonald v. Kirby, 3 Heisk. 607.

WHEN CONSIDERATION MAY BE PAID.—The consideration must arise at the time of the transfer.[1] It is not, however, necessary that an actual payment shall be made. A promise to pay, or the giving of securities, will constitute a party a purchaser.[2] A check given in good faith on a banker having funds to pay it is *prima facie* payment if accepted as cash, although its payment is subsequently suspended on account of a controversy concerning the property.[3] A transfer may be made for an annuity as well as for money in hand.[4] An existing debt[5] or liability, either as indorser[6] or surety,[7] is sufficient. The debt may also be unliquidated.[8] If a father takes a note

[1] Starr v. Starr, 1 Ohio, 321.

[2] Seward v. Jackson, 8 Cow. 406; s. c. 5 Cow. 67; Shontz v. Brown, 27 Penn. 123; Pattison v. Stewart, 6 W. & S. 72; Stafford v. Stafford, 27 Penn. 144; Starr v. Strong, 2 Sandf. Ch. 139; Alexander v. Todd, 1 Bond, 175.

[3] Woodville v. Reed, 26 Md. 179.

[4] Union Bank v. Toomer, 2 Hill Ch. 27.

[5] Holbird v. Anderson, 5 T. R. 235; Loeschigk v. Hatfield, 5 Robt. 26; s. c. 4 Abb. Pr. (N. S.) 210; 51 N. Y. 660; Gleason v. Day, 9 Wis. 498; Seymour v. Wilson, 19 N. Y. 417; Adams v. Wheeler, 27 Mass. 199; Gibson v. Seymour, 4 Vt. 518; Seymour v. Briggs, 11 Wis. 196; McMahan v. Morrison, 16 Ind. 172; Towsley v. McDonald, 32 Barb. 604; Wilson v. Ayer, 7 Me. 207; Starin v. Kelly, 36 N. Y. Sup. 366; *vide* Harney v. Pack, 12 Miss. 229; Pope v. Pope, 40 Miss. 516.

[6] Jewett v. Warren, 12 Mass. 300; Newman v. Bagley, 33 Mass. 570; Buffum v. Green, 5 N. H 71; Bartels v. Harris, 4 Me. 146; Prescott v. Hayes, 43 N. H. 593; Hendricks v. Robinson, 2 Johns. Ch. 283; s. c. 17 Wend. 438; Griffith v. Bank, 6 G. & J. 424; Bank v. McDade, 4 Port. 252; McLaren v. Thompson, 40 Me. 284; Stevens v. Hinckley, 43 Me. 440; Boswell v. Green, 25 N. J. 390; Lindle v. Neville, 13 S. & R. 227; St. John v. Camp, 17 Conn. 222.

[7] Fling v. Goodall, 40 N. H. 208; Ferguson v. Furnace Co., 9 Wend. 345; Gorham v. Herrick, 2 Me. 37; Stedman v. Vickery, 42 Me. 132; Hopkins v. Scott, 20 Ala. 179; Leggett v. Humphreys, 21 How. 66; Miller v. Howry, 3 Penn. 374; Gibson v. Seymour, 4 Vt. 518; Pennington v. Woodall, 17 Ala. 685; Tunnell v. Jefferson, 5 Harring. 206; s. c. 2 Del. Ch. 135; Coker v. Shropshire, 59 Ala. 542.

[8] Dewey v. Littlejohn, 2 Ired. Eq. 495; *vide* Adams v. Adams, 1 Dane Ab. 636.

at the time of making an advance to his son, he retains the control of the money, and a transfer in consideration of it is valid, although he may not have intended under certain circumstances to enforce payment.[1] A person who is entering into a bond as surety, for the faithful performance by an officer of his public duties, may provide for his counter security; for, there is a contract at the time to repay to the surety any money the latter may be compelled to pay for the principal, and the performance of this may be insured by security taken either before or after default.[2] If the liability of a surety on an administration bond is extinguished by a settlement of the estate and a discharge of the principal, a conveyance to indemnify him is without consideration.[3] Where there is no other consideration than a pre-existing debt and the parties afterwards treat it as still due, the transfer is without consideration.[4]

NOT MERELY GOOD BETWEEN THE PARTIES.—The consideration must be valuable, and not such as is merely good between the parties,[5] but a mortgage to secure the debt of another is not voluntary.[6] A voluntary bond is not a good consideration as against creditors,[7] but if it is

[1] Arnold v. Arnold, 8 B. Mon. 202.

[2] Dewey v. Littlejohn, 2 Ired. Eq. 495.

[3] Crawford v. Kirksey, 50 Ala. 591.

[4] Starr v. Starr, 1 Ohio, 321; Oliver v. Moore, 23 Ohio St. 473.

[5] Seymour v. Wilson, 19 N. Y. 417; *vide* Garretson v. Kane, 27 N. J. 208.

[6] Marden v. Babcock, 43 Mass. 99; *ex parte* Hearn, Buck Bank Cas. 165.

[7] Hawkins v. Allston, 4 Ired. Eq. 137; McGill v. Harman, 2 Jones Eq. 179; Stiles v. Attorney General, 2 Atk. 152; Gilham v. Locke, 9 Ves. 612; Stephens v. Harris, 6 Ired. Eq. 57; Cray v. Rooke, Cas. Temp. Talb. 153; Jones v. Powell, 1 Eq. Cas. Abr. 84; Lechmere v. Earl, 3 P. Wms. 211.

due, or the instalments payable thereon are in arrear, then the sum so due can be enforced at law, and is a good consideration for a conveyance made in good faith.[1] Interest which cannot be collected at law is not a good consideration,[2] but there are many transactions in which interest is habitually charged and paid when it could not be claimed on the ground of strict legal right, and, as they are considered as fair and just between the parties, they are good as to others.[3]

VALUABLE CONSIDERATIONS.—The note of a minor is a good consideration, for there is no legal bar to his right to purchase property upon credit, and neither the vendor nor his creditors can avoid or impeach the transfer or question its validity upon the ground of his minority.[4] The note of a *feme covert* is not a valuable consideration, although it may be paid subsequently.[5] A second judgment may be taken for a prior judgment without releasing or satisfying the latter,[6] for a creditor may take as many successive judgments for his first as the debtor is willing to give, and each will be good and available until the debt, interest and costs are paid. An absolute deed intended as a mortgage may be changed by the parties into a mortgage, and a judgment confessed for the debt.[7] A promise to pay specific debts whether by parol or in

[1] Stiles v. Attorney General, 2 Atk. 152; Gilham v. Locke, 9 Ves. 612; Tanner v. Byne, 1 Sim. 160; *ex parte* Berry, 19 Ves. 218; Hopkirk v. Randolph, 2 Brock. 132; Welles v. Cole, 6 Gratt. 645. *Contra*, Bank v. Mitchell, Rice Ch. 389.

[2] Whittacre v. Fuller, 5 Minn. 508; McKenty v. Gladwin, 10 Cal. 227; Scales v. Scott, 13 Cal. 76.

[3] Spencer v. Ayrault, 10 N. Y. 202.

[4] Matthews v. Rice, 31 N. Y. 457; Washband v. Washband, 27 Conn. 424; *vide* McCorkle v. Hammond, 2 Jones (N. C.) 444; Winchester v. Reid, 8 Jones (N. C.) 377.

[5] Howe v. Wildes, 34 Me. 566.

[6] Cox v. McBee, 1 Spears, 195.

[7] Smith's Appeal, 2 Penn. 331.

writing is a valuable consideration,[1] but when the debts are also incumbrances on the property, the purchaser must agree to protect the debtor and the rest of his property from them, and not merely take the property subject to the incumbrances.[2] If the value of the property exceeds the amount of the incumbrance, an agreement to pay off the incumbrance is not a good consideration.[3] A note may be given to an agent for a debt due to the principal and a judgment confessed thereon.[4]

Release of Equity of Redemption.—A conveyance of the equity of redemption by a mortgagor to a mortgagee without the payment of any new consideration is not a voluntary conveyance, and void as against creditors, when the amount due on the note or other obligation, the payment of which is secured by the mortgage, is equal to the whole value of the mortgaged premises. By operation of law and without any special agreement of the parties on the subject, it effects a discharge of the mortgage debt, either wholly, if the estate is sufficient, or *pro rata* if of less value than the amount due. To make such a transaction a voluntary conveyance as against creditors, the estate must be of greater value than the debt.[5]

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[1] Shontz v. Brown, 27 Penn. 123; Jenkins v. Peace, 1 Jones (N. C.) 413; Stevens v. Hinckley, 43 Me. 440; Gunn v. Butler, 35 Mass. 248; Pattison v. Stewart, 6 W. & S. 72; Meade v. Smith, 16 Conn. 346; Anderson v. Smith, 5 Blackf. 395; Seaman v. Hasbrouck, 35 Barb. 151; Keen v. Kleckner, 42 Penn. 529; Bell v. Greenwood, 21 Ark. 249; Preston v. Jones, 50 Penn. 54; Vanmeter v. Vanmeter, 3 Gratt. 148; Fleischer v. Dignon, 53 Iowa, 288; Sonstiby v. Keeley, 7 Fed. Rep. 447; Ivancovich v. Stern, 14 Nev. 341.

[2] U. S. v. Mertz, 2 Watts, 406; Carpenter v. Carpenter, 25 N. J. Eq. 194.

[3] First Nat'l Bank v. Bertschy, 52 Wis. 438.

[4] Harris v. Alcock, 10 G. & J. 226; Insurance Co. v. Wallis, 23 Md. 173; Bank v. Higginbottom, 9 Pet. 48.

[5] Williams v. Robbins, 81 Mass. 590; Credle v. Carawan, 64 N. C. 422.

DAMAGES FOR UNLAWFUL MARRIAGE.—If a woman in contemplation of marriage conveys property to her intended husband, and the marriage is void, the failure of the consideration constitutes a sufficient consideration for a re-conveyance.[1] As she can also maintain an action at law for the deceit by which she was led into such a marriage, the damages inflicted upon her constitute a valuable consideration for a transfer of his property to her.[2] Indemnity to a woman against the consequences of an illicit intercourse is also a good consideration within the statute,[3] but a transfer which looks to future cohabitation is illegal and void as against creditors.[4] If a transfer, however, is made for a valuable consideration at the time, it can not be vitiated by a subsequent cohabitation with the debtor any more than by cohabitation with any other person, unless such subsequent cohabitation entered into the consideration of the transfer.[5] A transfer as a mere gratuity to a paramour or for her to hold for the benefit of the grantor, or a purchase made in her name for the purpose of facilitating future illicit intercourse, is not founded upon a good consideration within the meaning of the statute.[6] A claim of damages for seduction is a valuable consideration.[7]

FIRM PROPERTY TO PAY INDIVIDUAL DEBTS.— A firm is in law distinct from the members who compose it, and

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[1] Forbush v. Williams, 33 Mass. 42.

[2] Fellows v. Emperor, 13 Barb. 92; Hutchinson v. Horn. 1 Smith, 242; s. c. 1 Ind. 363; Lady Cox's Case, 3 P. Wms. 389; *vide* Gilham v. Locke, 9 Ves. 612. [3] Wait v. Day, 4 Denio, 439; Gray v. Mathias, 5 Ves. 286.

[4] Wait v. Day, 4 Denio, 439; Sherman v. Barrett, 1 McMullen, 47; Hargroves v. Meray, 2 Hill Ch. 222; Lady Cox's Case, 3 P. Wms. 389; Gray v. Mathias, 5 Ves. 286; Potter v. Gracie, 58 Ala. 303.

[5] Fellows v. Emperor, 13 Barb. 92.

[6] Wait v. Day, 4 Denio, 439. [7] Carlisle v. Gaskill, 4 Ind. 219.

a transfer of the firm property to pay the separate debts of one of the partners is a voluntary conveyance.[1] A previous division of the property when the firm is insolvent will not make any difference, for there is then nothing to divide.[2] A debt contracted in the name of one of the partners may, however, be shown to have been for the benefit of the firm, and will then constitute a good consideration.[3] If property is purchased in the firm name, with the assets of a prior firm, a transfer of a part or the whole of it to secure a creditor of such prior firm is valid.[4] Where the firm is insolvent, a transfer of the firm property by one partner to the other on a stipulation by the latter to pay the firm debts is without consideration as against the firm creditors.[5] But a separate creditor in such case can not be injured by a transfer of one partner's interest in the partnership property to his copartner in consideration of the grantee's assuming the liabilities of the firm,[6] and therefore can not object to it. As each partner is personally liable for the payment of the partnership liabilities, a transfer of his separate property in consideration of a debt due by the firm is founded upon a good con-

[1] Burtus v. Tisdall, 4 Barb. 571; Anderson v. Maltby, 2 Ves. Jr. 244; Elliott v. Stevens, 38 N. H. 311; Ferson v. Monroe, 21 N. H. 462; Geortner v. Canajoharie, 2 Barb. 625; Dart v. Farmers' Bank, 27 Barb. 337; Walsh v. Kelley, 42 Barb. 98; s. c. 27 How. Pr. 359; Wilson v. Robertson, 21 N. Y. 587; s. c. 19 How. Pr. 350; Hartley v. White, 94 Penn. 31. *Contra*, Sigler v. Knox County Bank, 8 Ohio St. 511; National Bank v. Sprague, 20 N. J. Eq. 13; Schaeffer v. Fithian, 17 Ind. 463; McDonald v. Beach, 2 Blackf. 55; Haben v. Harshaw, 49 Wis. 379; Schmidlapp v. Currie, 55 Miss. 597.

[2] Burtus v. Tisdall, 4 Barb. 571.

[3] Siegel v. Chidsey, 28 Penn. 279; Gwin v. Selby, 5 Ohio St. 96; Haben v. Harshaw, 49 Wis. 379; Schaeffer v. Fithian, 17 Ind. 463; Wait v. Bull's Head Bank, 19 N. B. R. 500.

[4] Day v. Wetherby, 29 Wis. 363.

[5] *Ex parte* Mayou, 4 De G. J. & S. 664.

[6] Griffin v. Cranston, 10 Bosw. 1; s. c. 1 Bosw. 281.

sideration.[1] Money loaned to a stockholder may be shown to have been used for the benefit of the corporation, and is a good consideration for a transfer made by the latter to the creditor.[2]

FUTURE ADVANCES.—A transfer may be made in good faith to secure indorsements[3] or future advances.[4] The mere fact that such transfer may afford an opportunity for a fraudulent collusion is not a valid objection,[5] for its validity depends upon the attending circumstances. A mortgage to secure future advances should indicate the extent of the lien with certainty,[6] but no certain sum need

[1] Stewart v. Slater, 6 Duer, 83. [2] Head v. Horn, 18 Cal. 211.

[3] Gardner v. Webber, 34 Mass. 407; Calkins v. Lockwood, 16 Conn. 276; U. S. v. Hooe, 3 Cranch, 73; Goddard v. Sawyer, 91 Mass. 78; Worseley v. DeMattos, 1 Burr, 467.

[4] Doyle v. Smith, 1 Cold. 15; Cole v. Albers, 1 Gill, 412; Hendricks v. Robinson, 2 Johns. 283; s. c. 17 Johns. 438; Craig v. Tappin, 2 Sandf. Ch. 78; Townsend v. Empire Co., 6 Duer, 208; Lansing v. Woodworth, 1 Sandf. Ch. 43; Bank of Utica v. Finch, 3 Barb. Ch. 293; Carpenter v. Blote, 1 E. D. Smith, 491; U. S. v. Hooe, 3 Cranch, 73; Shirras v. Craig, 7 Cranch, 34; Lawrence v. Tucker, 23 How. 14; Foster v. Reynolds, 38 Mo. 553; Allen v. Montgomery R. R. Co., 11 Ala. 437; Coles v. Sellers, 1 Phila. 533; Crane v. Deming, 7 Conn. 387; Hubbard v. Savage, 8 Conn. 215; Commercial Bank v. Cunningham, 41 Mass. 270; Wescott v. Gunn, 4 Duer, 107; McDaniels v. Colvin, 16 Vt. 300; Collins v. Carlisle, 13 Ill. 254; Seaman v. Flemming, 7 Rich. Eq. 283; Bell v. Flemming, 12 N. J. Eq. 13; Griffin v. N. J. Oil Co., 11 N. J. Eq. 49; Barnard v. Moore, 90 Mass. 273; Speer v. Skinner, 35 Ill. 282; Adams v. Wheeler, 27 Mass. 199; Badlam v. Tucker, 18 Mass. 389; Wilder v. Winne, 6 Cow. 284; Smyth v. Ripley, 33 Conn. 306; McGavock v. Deery, 1 Cold. 265; U. S. v. Lennox, 2 Paine, 180; Wilson v. Russell, 13 Md. 494; Irwin v. Wilson, 3 Jones Eq. 210; DeWolf v. Harris, 4 Mason, 515; s. c. 4 Pet. 147; Blood v. Palmer, 11 Me. 414; Miller v. Lockwood, 32 N. Y. 293; Atkinson v. Maling, 2 T. R. 462; Googins v. Gilmore, 47 Me. 9; Holbrook v. Baker, 5 Me. 309; Griffin v. Stoddard, 12 Ala. 783; *vide* Bank v. Willard, 10 N. H. 210.

[5] Wilson v. Russell, 13 Md. 494; U. S. v. Hooe, 3 Cranch, 73.

[6] Truscott v. King, 6 N. Y. 147; Younge v. Wilson, 24 Barb. 510; Craig v. Tappin, 2 Sandf. Ch. 78; Divver v. McLaughlin, 2 Wend. 596.

be named.[1] It may be taken for an absolute sum.[2] A judgment may also be taken to secure future advances.[3]

SERVICES BETWEEN MEMBERS OF THE SAME FAMILY.—The law implies no promise to pay for services rendered by members of a family to each other, whether by children, parents, grandparents, brothers, stepchildren, or other relations. The rule rests upon the simple reason that such services are not performed in the expectation or upon the faith of receiving pecuniary compensation. The services rendered in such cases are mutual, and it may often be difficult to decide upon which party the principal benefit is conferred. Services so rendered do not, therefore, constitute a valuable consideration for a transfer.[4] A claim for board when a child resides with his parents after his majority, rests upon the same principle.[5] As a parent is entitled to the earnings of his minor child,[6] and a husband to the earnings of his wife,[7] a trans-

[1] Robinson v. Williams, 22 N. Y. 380.

[2] Miller v. Lockwood, 32 N. Y. 293; Shirras v. Craig, 7 Cranch, 34; Bevins v. Dunham, 1 Spears, 39; Tully v. Harloe, 35 Cal. 302; Summers v. Roos, 43 Miss. 749. *Contra*, Peacock v. Tompkins, Meigs, 317; Neuffer v. Pardue, 3 Sneed, 191.

[3] Brinkerhoff v. Marvin, 5 Johns. Ch. 320; Lansing v. Woodworth 1 Sandf. Ch. 43; Livingston v. McInlay, 16 Johns. 165; Walker v. Snediker, Hoff, 145; Truscott v. King, 6 N. Y. 147. *Contra*, Clapp v. Ely, 10 N. J. Eq. 178; s. c. 27 N. J. 555.

[4] Updike v. Titus, 13 N. J. Eq. 151; Hack v. Stewart, 8 Penn. 213; Sanders v. Wagonseller, 19 Penn. 248; Van Wyck v. Seward, 18 Wend. 375; s. c. 6 Paige, 62; 1 Edw. 327; Zerbe v. Miller, 16 Penn. 488; Hart v. Flinn, 36 Iowa, 366; Griffin v. First Nat'l Bank, 74 Ill. 259; Bartlett v. Mercer, 8 Ben. 439; Miller v. Sauerbier, 30 N. J. Eq. 71; King v. Malone, 31 Gratt. 158; Stearns v. Gage, 79 N. Y. 102.

[5] Coley v. Coley, 14 N. J. Eq. 350.

[6] Swartz v. Hazlett, 8 Cal. 118; Brown v. McDonald, 1 Hill Ch. 297; Dick v. Grissom, 1 Freem. Ch. (Miss.) 428; Danley v. Rector, 10 Ark. 211.

[7] Skillman v. Skillman, 13 N. J. Eq. 403; Belford v. Crane, 16 N. J. Eq. 265; Cramer v. Reford, 17 N. J. Eq. 367; Beach v. Baldwin, 14 Mo.

fer in consideration of such earnings by a person to his wife or child is voluntary. If the child works for another, the proceeds belong to the parent, and are not a valuable consideration for a transfer from a parent to the child.[1] A contract by a minor for his emancipation constitutes a moral obligation, and is a sufficient consideration for a promise made by him when he is of age.[2]

597; Pinkston v. McLemore, 31 Ala. 308; Elliot v. Bentley, 17 Wis. 591; Carpenter v. Carpenter, 25 N. J. Eq. 194; Clinton Manuf. Co. v. Hummell, 25 N. J. Eq. 45; Keating v. Keefer, 5 N. B. R. 133; s. c. 4 A. L. T. 162; Mitchell v. Seitz, 1 MacArthur, 480; McAnally v. O'Neal, 56 Ala. 299; Campbell v. Bowles, 30 Gratt. 652; Coleman v. Burr, 32 N. Y. Supr. 293.

[1] Winchester v. Reid, 8 Jones (N. C.) 377; Worth v. York, 13 Ired. 206; U. S. v. Mertz, 2 Watts, 406.

[2] Geist v. Geist, 2 Penn. 441.

CHAPTER X.

WHAT TRANSFERS ARE WITHIN THE STATUTE.

COMPREHENSIVENESS OF THE STATUTE.—The statute invalidates all and every fraudulent feoffment, gift, grant, alienation, bargain and conveyance of land, tenements, hereditaments, goods and chattels, or any of them, or of any lease, rent, common, or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution, and, as it is merely declaratory of the common law, the common law in its abhorrence of fraud is able to reach every other fraudulent device not included in it. *Ait prætor: Quæ fraudationis causa gesta erunt cum eo qui fraudem non ignoraverit de his curatori bonorum vel ei cui de ea re actionem dare opportebit infra annum, quo experiundi potestas fuerit, actionem dabo; idque etiam adversus ipsum qui fraudem fecit, servabo. Necessario prætor hoc edictum proposuit; quo edicto consulit creditoribus revocando ea quaecunque in fraudem eorum alienata sunt. Ait ergo prætor, quæ fraudationis causa gesta erunt. Haec verba generalia sunt et continent in se omnem omnino in fraudem factam, vel alienationem vel quemcunque contractum. Quodcunque igitur fraudis causa factum est, videtur his verbis revocari, qualecunque fuerit, nam late ista verba patent. Sive ergo rem alienavit sive acceptilatione vel pacto aliquem liberavit, idem erit probandum. Et si pignora liberet vel quem alium in fraudem creditorum præponat*

vel ei præbuit exceptionem sive se obligavit fraudandorum creditorum causa sive numeravit pecuniam vel quodcunque aliud fecit in fraudem creditorum, palam est edictum locum habere. Gesta fraudationis causa accipere debemus non solum ea quæ contrahens gesserit aliquis, verum etiam si forte data opera ad judicium non adfuit vel litem mori patiatur vel a debitore non petit ut tempore liberatur aut usum fructum vel servitutem amittit et qui aliquid facit ut desinat habere quod habet, ad hoc edictum pertinet. In fraudem facere videri etiam eum qui non facit quod debet facere intelligendum est, id est si non utatur servitutibus; sed etsi rem suam pro derelicto habuerit ut quis eam suam faciat.[1]

NOT TRANSFERS TO DEBTORS.—In order to be within the prohibition of the statute, the transfer must be one that is made by a debtor and not to a debtor. Although a person is insolvent, others may make any contract with him which is not otherwise prohibited by law. They may place goods in his hands to sell,[2] or leave them in his possession,[3] or allow him the profits arising from sales made by him,[4] even though he is to sell in his own name,[5] or deliver articles to him upon condition that the title shall not vest in him until he shall have paid all the purchase-money,[6] or advance money to a mechanic under

[1] Dig. Lib. 42, tit. 9; 1 Domat. B. 2, tit. 10.

[2] Howard v. Sheldon, 11 Paige, 558; Blood v. Palmer, 11 Me. 414; Robinson v. Chapline, 9 Iowa, 91; McClune v. Cain, 3 Abb. Ap. 76; Dreyer v. Durand, 80 Ill. 561.

[3] Hill v. Hill, 1 Dev. & Bat. 336; Anderson v. Biddle, 10 Mo. 23; Norris v. Bradford, 4 Ala. 203.

[4] Patten v. Clark, 22 Mass. 4; McCullough v. Porter, 4 W. & S. 177.

[5] Blood v. Palmer, 11 Me. 414; Merrill v. Rinker, 1 Bald. 528.

[6] Esty v. Aldrich, 46 N. H. 127; Forbes v. Marsh, 15 Conn. 384; McFarland v. Farmer, 42 N. H. 386; Strong v. Taylor, 2 Hill, 326; Hill v. Freeman, 57 Mass. 257; Bailey v. Harris, 8 Iowa, 331; Reeves v.

a stipulation for an interest in the article to be manufactured by him,[1] or purchase articles to be subsequently manufactured,[2] or employ a mechanic with wages varying according to the profits.[3] Whenever property is thus placed in the hands of an insolvent debtor, it is always a question whether or not the form of the transaction is not merely colorable.[4] If there is in fact a sale,[5] or a gift,[6] the property will be liable to his debts. The title will generally be considered to be vested in him when the property is delivered to him for consumption, or to be dealt with in any way inconsistent with the ownership of the grantor, or in a manner that would necessarily destroy the grantor's lien or right of property.[7] When an agent exceeds his authority, and purchases goods in the name of

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Harris, 1 Bailey, 563; Baylor v. Smithers' Heirs, 1 Litt. 105; Bickerstaff v. Doub, 19 Cal. 109; Chaffee v. Sherman, 26 Vt. 237; Paris v. Vail, 18 Vt. 277; Ayer v. Bartlett, 23 Mass. 71; Rogers' Locomotive Works v. Lewis, 4 Dillon, 158; Blackwell v. Walker, 5 Fed. Rep. 419. *Contra*, Rose v. Story, 1 Penn. 190; Haak v. Linderman, 64 Penn. 499; Becker v. Smith, 59 Penn. 469; Waldron v. Haupt, 52 Penn. 408; Lehigh Co. v. Field, 8 W. & S. 232; Ketchum v. Watson, 24 Ill. 592; Stiles v. Whitaker, 1 Phila. 271; Heppe v. Speakman, 3 Brews. 548; s. c. 7 Phila. 117; Henkels v. Brown, 4 Phila. 299.

[1] Beaumont v. Crane, 14 Mass. 400; Frost v. Willard, 9 Barb. 440; Glover v. Allen, 23 Mass. 200; Calkins v. Lockwood, 16 Conn. 276; Macomber v. Parker, 30 Mass. 175; s. c. 31 Mass. 497; Becker v. Smith, 59 Penn. 469; King v. Humphreys, 10 Penn. 217.

[2] Veazie v. Holmes, 40 Me. 69; Bartlett v. Blake, 37 Me. 124; *vide* Jenkins v. Eichelberger, 4 Watts, 121.

[3] Faulkner v. Waters, 28 Mass. 473.

[4] Haynes v. Ledyard, 33 Mich. 319.

[5] Merrill v. Rinker, 1 Bald. 528; Strong v. Taylor, 2 Hill, 326; Wheeler v. Konst, 46 Wis. 398.

[6] Norris v. Bradford, 4 Ala. 203; Fitzhugh v. Anderson, 2 H. & M. 289; Ford v. Aikin, 4 Rich. 121; McDermott v. Barnum, 16 Mo. 114; s. c. 19 Mo. 204; *vide* Hollowell v. Skinner, 4 Ired. 165.

[7] Ludden v. Hazen, 31 Barb. 650; Dick v. Cooper, 24 Penn. 217; Heitzman v. Divil, 11 Penn. 264.

his principal as a means of covering them from his creditors, they are liable to execution and sale for his debts.[1] A devise with a secret trust to hold for the debtor is not within the statute.[2]

PAYMENTS TO A DEBTOR.—A payment of money to a debtor is not within the statute, even though it is made for the purpose of avoiding an attachment.[3] *Apud Labeonem scriptum est eum qui suum, recipiat, nullam videri fraudem facere, hoc est, eum qui quod sibi debetur receperat. Eum enim quem præses invitum solvere cogat, impune non solvere, iniquum esse. Totum enim hoc edictum ad contractus pertinere, in quibus se prætor non interponit, ut puta pignora, venditionesque.*[4]

ONLY THE CREDITOR'S OWN DEBTOR.—The statute, moreover, intends simply to guard a creditor from the fraudulent attempt of his debtor to delay, hinder, or defraud him of the recovery of his debt by disposing of the property which he would have a right to seize as soon as he obtains a judgment. The very term creditor implies this. There can be no creditor but where there is a debtor, and no party is a creditor of any one save the person who owes him the money. The creditors of A. can not, therefore, derive any assistance from the act in respect to the fraudulent transfers of B., C. and D., for it is of no consequence to them what B., C. and D. may do with their property. Such transfers can not delay, hinder, or defraud them. Consequently a transfer by a *feme sole* on the eve of marriage for the purpose of protecting the property against

[1] White v. Cooper, 3 Penn. 130.
[2] M'Kee v. Jones, 6 Penn. 425.
[3] Simpson v. Dall, 3 Wall. 460; Fletcher v. Pillsbury, 35 Vt. 16.
[4] Dig. lib. 42, tit. 9; see 1 Domat. B. 2, tit. 10.

the claims of the creditors of her intended husband is not fraudulent as against them.[1] A term of years which belongs to the debtor's wife as administratrix is not liable for his debts, and a transfer of it is not within the statute as against his creditors.[2] But if a *feme sole*, being in debt, conveys her property in trust for her benefit and then marries a person who becomes a bankrupt, her property, so far as she takes a separate estate under the trust, is liable to satisfy her debts. Although the discharge of her husband releases her personally at law, yet her property is not discharged, for the failure to make a provision for her creditors renders the transfer fraudulent as against them.[3]

KIND OF PROPERTY.—In respect to the kind of property which may be the subject of a fraudulent transfer, the statute extends to lands, tenements, hereditaments, goods and chattels, and any lease, rent, common or other profit or charge out of lands, tenements, hereditaments, goods or chattels. It is important, however, to bear in mind that the common law has not been repealed, and consequently will reach every species of property not included in this enumeration. The source from which the debtor derived the property is wholly immaterial.[4] If a transfer is fraudulent, the grantee can not retain the property on the ground that it is of no value.[5]

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[1] Land v. Jeffries, 5 Rand. 211, 599; Andrews v. Jones, 10 Ala. 400; Prior v. Kinney, 6 Munf. 510; Comm. v. Fletcher, 6 Bush. 171.

[2] Ridler v. Punter, Cro. Eliz. 291.

[3] Chubb v. Stretch, L. R. 9 Eq. 555; Briscoe v. Kennedy, 1 Brock. 17, note; Miles v. Williams, 1 P. Wms. 249; Hamlin v. Bridge, 24 Me. 145; Dickson v. Miller, 19 Miss. 594; *vide* Vanderheyden v. Mallory, 1 N. Y. 452; s. c. 3 Barb. Ch. 9.

[4] Bank v. Ballard, 12 Rich. 259.

[5] Garrison v. Monagan, 33 Penn. 232; *vide* Hanly v. Logan, 1 Duvall, 242.

CHOSES IN ACTION.—The terms "goods and chattels" are the generic denomination of things personal as distinguished from things real, or lands, tenements and hereditaments, and embrace things in action as well as in possession,[1] even though the *choses in action* were unknown at the time of the passage of the statute.[2] But as stock,[3] *choses in action*,[4] and money,[5] could not be taken on execution at common law, it has been doubted whether a transfer of such property could be fraudulent. The question is one that relates merely to the remedy as affected by the character of the property, and, whenever a statute enables a creditor to reach such property, either by attachment or execution, a transfer of it becomes liable to investigation on the ground of fraud.[6] Even independently of such statutory provisions the better doctrine is that a court of equity, in aid of an execution at law, may, for the purpose of suppressing fraud and enforcing justice, reach property which is not liable to legal process at law. Equity follows out the law in this respect by adopting its maxims and carrying them out according to the principles of justice and right. Where the law fails, equity, there-

[1] Pinkerton v. Manchester R. R. Co., 42 N. H. 424; Elliott's Appeal, 50 Penn. 75. [2] Elliott's Appeal, 50 Penn. 75.

[3] Horn v. Horn, Ambl. 79; Dundas v. Dutens, 1 Ves. Jr. 196; s. c. 2 Cox, 235; Rider v. Kidder, 10 Ves. 360; s. c. 12 Ves. 202; 13 Ves. 123.

[4] Sims v. Thomas, 12 Ad. & E. 536; s. c. 4 P. & D. 233; 9 L. J. (N. S.) Q. B. 399; Grogan v. Cooke, 2 Ball. & B. 233; Norcut v. Dodd, 1 Cr. & Ph. 100. [5] Duffin v. Furness, Sel. Cas. Ch. 77.

[6] Pinkerton v. Manchester R. R. Co., 42 N. H. 424; Gaylord v. Couch, 5 Day, 223; Warden v. Jones, 2 De G. & J. 76; s. c. 27 L. J. Ch. 190; Sims v. Thomas, 12 Ad. & E. 536; s. c. 4 P. & B. 233; 9 L. J. (N. S.) Q. B. 299; Stokoe v. Cowan, 29 Beav. 637; Barrack v. McCulloch, 3 K. & J. 110; s. c. 26 L. J. Ch. 105; Magawley's Trust, 5 De G. & S. 1; Freeman v. Pope, L. R. 5 Ch. Ap. 538; s. c. L. R. 9 Eq. 206; Stokes v. Coffey, 8 Bush, 533; Elliott's Appeal, 50 Penn. 75; Scott v. Indianapolis Wagon Works, 48 Ind. 75.

fore, affords relief for the purpose of enforcing the payment of just debts.[1]

PURCHASES IN NAME OF ANOTHER.—At one time there was some question whether creditors could reach property which was paid for by the debtor when the title was fraudulently conveyed by the vendor to another.[2] The statute makes all fraudulent conveyances void, but if such a transfer were void, the title would remain in the grantor, and consequently the creditors could not seize the property. Such a contrivance is manifestly not within the provisions of the statute.[3] It is, however, within the principles of the common law which will not permit a debtor to convert his funds, which ought to be applied to pay his debts, to the purchase of property conveyed to another to

[1] Taylor v. Jones, 2 Atk. 600; Partridge v. Gopp, 1 Eden, 163; s. c. Ambl. 596; Bayard v. Hoffman, 4 Johns. Ch. 450; Horn v. Horn, Ambl. 79; Smithier v. Lewis, 1 Vern. 398; Hopkirk v. Randolph, 2 Brock. 132; Doughten v. Gray, 10 N. J. Eq. 323; Law v. Payson, 32 Me. 521; Bean v. Smith, 2 Mason, 252; Catchings v. Manlove, 39 Miss. 655; Pringle v. Hodgson, 3 Ves. 617; Planters' Bank v. Henderson, 4 Humph. 75; Abbott v. Tenny, 18 N. H. 109; Wright v. Petrie, 1 S. & M. Ch. 282; Green v. Tantum, 19 N. J. Eq. 105; s. c. 21 N. J. Eq. 364; Hadden v. Spader, 20 Johns. 554; s. c. 5 Johns. Ch. 280; Tappan v. Evans, 11 N. H. 311; Chase v. Searles, 45 N. H. 511; Weed v. Pierce, 9 Cow. 722; West v. Sanders, 1 A. K. Marsh. 108; Greer v. Wright, 6 Gratt. 154; Harlan v. Barnes, 5 Dana, 219; Sargent v. Salmon, 27 Me. 539; Drake v. Rice, 130 Mass. 410. *Contra*, Dundas v. Dutens, 1 Ves. Jr. 196; s. c. 2 Cox, 235; Rider v. Kidder, 10 Ves. 360; s. c. 12 Ves. 202; 13 Ves. 123; Matthews v. Feaver, 1 Cox, 278; Cosby v. Ross, 3 J. J. Marsh. 290; Winebrinner v. Weisiger, 3 Mon. 32; Crozier v. Young, 3 Mon. 157; Grogan v. Cooke, 2 Ball. & B. 233; Buford v. Buford, 1 Bibb. 305; Sims v. Thomas, 12 Ad. & E. 536; s. c. 4 P. & D. 233; 9 L. J. (N. S.) Q. B. 399; Norcut v. Dodd, 1 Cr. & Ph. 100; Bickley v. Norris, 2 Brev. 252; Duffin v. Furness, Sel. Cas. Ch. 77; Caillaud v. Estwick, 1 Anst. 381.

[2] Fletcher v. Sidley, 2 Vern. 490; Glaister v. Hewer, 8 Ves. 196; Proctor v. Warren, Sel. Cas. Ch. 78.

[3] Gowing v. Rich, 1 Ired. 553; Gardiner Bank v. Wheaton, 8 Me. 373; Gray v. Faris, 7 Yerg. 155.

the prejudice of his creditors.[1] Justice is attained by holding the grantee as a trustee for the benefit of the creditors upon the principle that a person acquiring a title by fraud shall be held as trustee for the injured person, although he did not intend to acquire the property in that character.[2] It may be considered as settled that property so purchased in the name of another is liable to the demands of creditors.[3] As the theory of the law is that the grantee holds the property as a trustee, the trust may always be enforced in equity.[4] Whether the property is also liable

[1] Taylor v. Heriot, 4 Dessau. 227; Alston v. Rowles, 13 Fla. 117.

[2] Coleman v. Cocke, 6 Rand. 618; Brown v. McDonald, 1 Hill Ch. 297; Godding v. Brackett, 34 Me. 27; Gray v. Faris, 7 Yerg. 155; Bean v. Smith, 2 Mason, 252.

[3] Peacock v. Monk, 1 Ves. Sr. 127; Christy v. Courtenay, 13 Beav. 96; Farrow v. Teackle, 4 H. & J. 271; Wright v. Douglass, 3 Barb. 554; Taylor v. Heriot, 4 Dessau. 227; Proseus v. McIntyre, 5 Barb. 424; Coleman v. Cocke, 6 Rand. 618; Christ's Hospital v. Budgin, 2 Vern. 683; Doyle v. Sleeper, 1 Dana, 531; Bay v. Cook, 31 Ill. 336; Houghton v. Tate, 3 Y. & J. 486; Whittlesey v. McMahon, 10 Conn. 137; Tappan v. Butler, 7 Bosw. 480; Wood v. Savage, 2 Doug. (Mich.) 316; s. c. Walk. Ch. 471; Miller v. Wilson, 15 Ohio, 108; Carpenter v. Roe, 10 N. Y. 227; Mead v. Gregg, 12 Barb. 653; Croft v. Arthur, 3 Dessau. 223; National Bank v. Sprague, 20 N. J. Eq. 13; Dewey v. Long, 25 Vt. 564; Gough v. Henderson, 2 Head, 628; Farringer v. Ramsay, 2 Md. 365; s. c. 4 Md. Ch. 33; Stewart v. Cohn, 21 La. An. 349; North v. Bradway, 9 Minn. 183; Brown v. McDonald, 1 Hill Ch. 297; Cutter v. Griswold, Walk. Ch. 437; Brewster v. Power, 10 Paige, 562; Jackson v. Forrest, 2 Barb. Ch. 576; Neale v. Day, 28 L. J. Ch. 45; Barrack v. McCulloch, 3 K. & J. 110; s. c. 26 L. J. Ch. 105; De Chyrton's Case, Dyer, 295 *a*; Jencks v. Alexander, 11 Paige, 619; Sumner v. Sawtelle, 8 Minn. 309; Huggins v. Perine, 30 Ala. 396; Smith v. Parker, 41 Me. 452; Halbert v. Grant, 4 Mon. 580; Whittlesey v. McMahon, 10 Conn. 137; Whitney v. Stearns, 52 Mass. 319; Baldwin v. Johnston, 8 Ark. 260; Doolittle v. Bridgeman, 1 Iowa, 265; Smith v. Duncan, 2 Pitts. L. J. 186; Spicer v. Ayres, 2 N. Y. Supr. 626; Wall v. Fairley, 73 N. C. 464; Johnson v. May, 16 N. B. R. 425; Lockhard v. Beckley, 10 W. Va. 87. *Contra*, Fletcher v. Sidley, 2 Vern. 490; Glaister v. Hewer, 8 Ves. 196; Procter v. Warren, Sel. Cas. Ch. 78; Crozier v. Young, 3 Mon. 157.

[4] Patterson v. Campbell, 9 Ala. 933; Gardiner Bank v. Wheaton, 8 Me. 373; State Bank v. Harrow, 26 Iowa, 426; Smith v. Parker, 41 Me.

to an execution at law is a point upon which the decisions vary.[1] When the fraudulent grantee takes an assignment of an outstanding mortgage, purchased with the debtor's money, the legal title is in the debtor.[2]

EXPENDITURES UPON ANOTHER'S LAND.—If a debtor uses his personal property upon the real estate of another, with the knowledge and consent of the owner, so that it becomes a part of such realty, for the purpose of defrauding his creditors and preventing them from obtaining

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452; Brown v. McDonald, 1 Hill Ch. 297; Bertrand v. Elder, 23 Ark. 494; Corey v. Greene, 51 Me. 114; Marshall v. Marshall, 2 Bush. 415; Halbert v. Grant, 4 Mon. 580; Peay v. Sublet, 1 Mo. 449; Newell v. Morgan, 2 Harring. 225; s. c. 2 Del. Ch. 20; Dockray v. Mason, 48 Me. 178; Bay v. Cook, 31 Ill. 336; Belford v. Crane, 16 N. J. Eq. 265; Demaree v. Driskell, 3 Blackf. 115; Rucker v. Abell, 8 B. Mon. 566; Gordon v. Lowell, 21 Me. 251; McDowell v. Cochran, 11 Ill. 31; Walcott v. Almy, 6 McLean, 23; Gentry v. Harper, 2 Jones Eq. 177; Kehr v. Sickler, 48 Mo. 96; Smith v. Hinson, 4 Heisk. 250. *Contra*, Mill River Association v. Claflin, 91 Mass. 101.

[1] Guthrie v. Gardner, 19 Wend. 414; Bodine v. Edwards, 10 Paige, 504; Arnot v. Beadle, 1 Hill & D. 181; Tevis v. Doe, 3 Ind. 129; Pennington v. Clifton, 11 Ind. 162; Webster v. Withey, 25 Me. 326; Kimmell v. McRight, 2 Penn. 38; Cutter v. Griswold, Walk. Ch. 437; Roe v. Irwin, 32 Geo. 39; Coleman v. Cocke, 6 Rand. 618; Cecil Bank v. Snively, 23 Md. 253; Godding v. Brackett, 34 Me. 27; Clark v. Chamberlain, 95 Mass. 257; Wait v. Day, 4 Denio, 439; Hunt v. Blodgett, 17 Ill. 583; Herrington v. Herrington, 27 Mo. 560; Rankin v. Harper, 23 Mo. 579; Snow v. Paine, 114 Mass. 520; Peterson v. Farnum, 121 Mass. 476. In the following cases it has been held not liable: Howe v. Bishop, 44 Mass. 26; Garfield v. Hatmaker, 15 N. Y. 475; Brewster v. Power, 10 Paige, 562; Page v. Goodman, 8 Ired. Eq. 16; Worth v. York, 13 Ired. 206; Davis v. McKinney, 5 Ala. 719; Davis v. Tibbetts, 39 Me. 279; Gray v. Faris, 7 Yerg. 155; Dewey v. Long, 25 Vt. 564; Gowing v. Rich, 1 Ired. 553; Garrett v. Rhame, 9 Rich. 407; Jimmerson v. Duncan, 3 Jones (N. C.) 537; Low v. Marco, 53 Me. 45; Webster v. Folsom, 58 Me. 230; Hamilton v. Cone, 19 Mass. 478; Goodwin v. Hubbard, 15 Mass. 210; Buck v. Gilson, 37 Vt. 653; Stall v. Fulton, 30 N. J. 430; Smith v. Hinson, 4 Heisk. 250; Smith v. Ingles, 2 Or. 43.

[2] Stephens v. Sinclair, 1 Hill, 143.

satisfaction of their demands, they may still follow the property into the hands of the owner of the premises thus benefited, and fasten their claims upon such premises to the extent of the debtor's property so appropriated.[1] If a debt, however, has been created between the parties, the creditors can only have the debt appropriated to the satisfaction of their demands; but if no debt has been created, the appropriate remedy is to fasten their claim upon the real estate to the extent of the debtor's property thus made part of the realty. When the debtor with his family lives on the property of his wife, he may keep it habitable and in repair. Within reasonable limits this may be regarded as a necessary and proper means of performing his obligation to support his wife and family.[2] But whenever the expenditures are beyond what is absolutely necessary and proper for the shelter and maintenance of the family, they may be reached by his creditors What amounts to an excessive expenditure is difficult to determine and depends upon the peculiar circumstances of each case.[3] If he puts improvements upon her real estate which are temporary in their character and primarily calculated to promote his use and enjoyment of the premises as tenant for life, her estate can not be charged with the value of these temporary improvements.[4] It has, however, been held that improvements on the real estate of a minor can not be reached.[5]

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[1] Isham v. Schaffer, 60 Barb. 317; Lynde v. McGregor, 95 Mass. 182; Athey v. Knotts, 6 B. Mon. 24; Hoot v. Sorrell, 11 Ala. 386; Divine v. Steele, 10 B. Mon. 323; Kirby v. Bruns, 45 Mo. 234; Caswell v. Hill, 47 N. H. 407; Rose v. Brown, 11 W. Va. 122; Heck v. Fisher, 78 Ky. 643. *Contra*, Campion v. Cotton, 17 Ves. 264; Ewing v. Cantrell, Meigs, 364; Webster v. Hildreth, 33 Vt. 457.

[2] Dick v. Hamilton, 1 Deady, 322; Robinson v. Huffman, 15 B. Mon. 80; Shackelford v. Collier, 6 Bush. 149.

[3] Dick v. Hamilton, 1 Deady, 322. [4] Dick v. Hamilton, 1 Deady, 322.

[5] Mathes v. Dobschuetz, 72 Ill. 438.

Power of Appointment.—If a debtor has a general power of appointment, and executes it voluntarily without consideration for the benefit of a third person, the property so given under the power is liable to the demands of his creditors.[1] A power is general within the meaning of the rule according to the persons or uses to which the property may be appointed under it, and not according to the time when its exercise takes effect, or the instrument by which its exercise is to be manifested.[2] A general power is a power to appoint to whomsoever the donee pleases.[3] If there is only a power to appoint among certain persons, who are definitely described, so that the debtor can not make the appointment for himself, his creditors can not claim the benefit of it.[4] If the power is general, it makes no difference whether the appointment is by will or by deed.[5] It also makes no difference whether it is a power to charge a sum of money on land or to create a chattel interest out of land.[6] It has also been said that a general power makes the donee equitable owner of the estate, and gives him such a dominion over it as subjects it to his debts.[7]

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[1] Mackason's Appeal, 42 Penn. 330; Smith v. Garey, 2 Dev. & Bat. Eq. 42; Stillwell v. Mellersh, 20 L. J. Ch. 356; Townsend v. Windham, 2 Ves. Sr. 1; Lassels v. Cornwallis, 2 Vern. 465; s. c. Prec. Ch. 232; George v. Milbanke, 9 Ves. 189; Whittington v. Jennings, 6 Sim. 493; Bainton v. Ward, 2 Atk. 172; Pack v. Bathurst, 3 Atk. 269; Thompson v. Towne, 2 Vern. 319; s. c. Prec. Ch. 52; Tallmadge v. Sill, 21 Barb. 34.

[2] Johnson v. Cushing, 15 N. H. 298; Tallmadge v. Sill, 21 Barb. 34.

[3] Tallmadge v. Sill, 21 Barb. 34.

[4] Townsend v. Windham, 2 Ves. Sr. 1.

[5] Townsend v. Windham, 2 Ves. Sr. 1; Jenney v. Andrews, 6 Madd. 264; Williams v. Lomas, 16 Beav. 1.

[6] Townsend v. Windham, 2 Ves. Sr. 1.

[7] Bainton v. Ward, 2 Atk. 172; Ashfield v. Ashfield, 2 Vern. 287; Troughton v. Troughton, 3 Atk. 656; *vide* White v. Sansom, 3 Atk. 410.

EXEMPT PROPERTY.—If a debtor has money or property which is liable to legal process, he may convert it into property that is exempt.[1] If he owns property that is exempt absolutely and unconditionally, no conveyance of it can injure or defraud the creditors. Such an exemption is a privilege conferred upon him, and does not deprive him of any of the ordinary incidents of ownership, among which is the power to sell or otherwise dispose of it. He may, therefore, transfer it as he deems best for the purpose of bettering his condition or providing for his home, or furnishing his family, or prosecuting his business, or for any other object, and it will not be liable to execution in the hands of the purchaser. The creditors as to such property are not deemed to be creditors so as to make a transfer of it a matter of concern to them.[2] If the debtor sells his homestead, he may invest the proceeds in another

[1] O'Donnell v. Segar, 25 Mich. 367; North v. Shearn, 15 Tex. 174; Cipperly v. Rhodes, 53 Ill. 346; Randall v. Buffington, 10 Cal. 491; *In re* Henkel, 2 Saw. 305; s. c. 2 N. B. R. 546; Huron v. George, 18 Kans. 253; Tucker v. Drake, 93 Mass. 145. *Contra*, Riddell v. Shirley, 5 Cal. 488; Pratt v. Burr, 5 Biss. 36; Brackett v. Watkins, 21 Wend. 68; Rose v. Sharpless, 33 Gratt. 153.

[2] Erb v. Cole, 31 Ark. 554; Danforth v. Beattie, 43 Vt. 138; Smith v. Rumsey, 33 Mich. 183; Bond v. Seymour, 1 Chand. 40; s. c. 2 Pinney, 105; Legro v. Lord, 10 Me. 161; Vaughan v. Thompson, 17 Ill. 78; Wood v. Chambers, 20 Tex. 247; Cox v. Shropshire, 25 Tex. 113; Smith v. Allen, 39 Miss. 469; Martel v. Somers, 26 Tex. 551; Lishy v. Perry, 6 Bush. 515; Pike v. Miles, 23 Wis. 164; Dreutzer v. Bell, 11 Wis. 114; Anthony v. Wade, 1 Bush. 110; Morton v. Ragan, 5 Bush. 334; Foster v. McGregor, 11 Vt. 595; Patten v. Smith, 4 Conn. 450; s. c. 5 Conn. 196; Crummen v. Bennett, 68 N. C. 494; Keyes v. Rines, 37 Vt. 260; Monroe v. May, 9 Kans. 466; Cipperly v. Rhodes, 53 Ill. 346; Goumans v. Boomhower, 3 T. & C. 21; Whiting v. Barrett, 7 Lans. 106; Hibben v. Soyer, 23 Wis. 319; Kulage v. Schueler, 7 Mo. Ap. 250; McWilliams v. Rogers, 56 Ala. 87; Jewett v. Fink, 47 Wis. 451; Smith v. Schmitz, 10 Neb. 600; Hixon v. George, 18 Kans. 253; Dart v. Woodhouse, 40 Mich. 399; Ketchum v. Allen, 46 Conn. 414; Morrison v. Abbott, 27 Minn. 116; Ferguson v. Kumler, 27 Minn. 156.

homestead or other property, and take the title in the name of his wife.[1] If he continues to occupy the homestead, a conveyance thereof through another to his wife will not render it liable for his debts.[2] It is necessary however that the conveyance even in such a case shall be real and not merely colorable. If a debtor, for instance, being entitled to a homestead, makes a conveyance of it upon a secret trust that the grantee shall hold it for his benefit after he has abandoned the use of it as a homestead, it will become liable to his creditors after such abandonment.[3] If property is fraudulently purchased in the name of the debtor's wife, his creditors may reach it although he might have claimed it as exempt if it had been conveyed to him, for he may still claim other property as exempt.[4] If a homestead is exempt only conditionally while the debtor occupies and owns it, then a conveyance of it with the intent to delay, hinder, or defraud his creditors is void, and the property is liable to them.[5] Where the exemption is only allowed for goods intended to be used in carrying on a trade or business, the goods will be liable to his creditors if he changes his mind after having purchased them and sells them with the intent to delay, hinder, or defraud his creditors.[6] If the statute merely exempts property to a certain amount at the request of the debtor made at the time of the levy, a denial of his title and the assertion of ownership in another is a waiver of his right to the exemption.[7]

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[1] Monroe v. May, 9 Kans. 466; Derby v. Weyrich, 8 Neb. 174.

[2] Dreutzer v. Bell, 11 Wis. 114; Pike v. Miles, 23 Wis. 164.

[3] Cox v. Shropshire, 25 Tex. 113; *vide* Delashmut v. Frau, 44 Iowa, 613.

[4] Rogers v. McCauley, 22 Minn. 384.

[5] Piper v. Johnston, 12 Minn. 60; Chambers v. Sallie, 29 Ark. 407.

[6] Rayner v. Whicher, 88 Mass. 292; Stevenson v. White, 87 Mass. 148.

[7] Diffenderfer v. Fisher, 3 Grant, 303; Gilleland v. Rhoads, 34 Penn. 187.

PRIVILEGES.—*Quod autem cum possit aliquid quærere, non id agit ut adquirat, ad hoc edictum non pertinet. Pertinet enim edictum ad deminuentes patrimonium suum, non ad eos qui id agunt, ne locupletentur. Unde si quis ideo conditioni non paret ne committatur stipulatio, in ea conditione est ne faciat huic edicto locum.*[1] Such were the principles of the civil law, and such are the principles of law which have been recognized in the construction of the statute. The right of a settler upon the public lands to a pre-emption is a personal privilege which he can exercise at his pleasure, but which he is not bound to exercise either for his own benefit or that of his creditors. He can at any time abandon his possession and deprive himself of his right of pre-emption. If he transfers that right to another, who subsequently obtains a patent therefor, the title of the patentee will be valid against creditors of the settler, although the transfer was made with the intent to delay, hinder or defraud them.[2]

DEBTOR'S LABOR.—Creditors have no power to compel a debtor to labor and earn the means to pay their demands. He may resign himself to hopeless and endless want, or he may limit his exertions to just such an extent as may be adequate to furnish him the means of a scanty subsistence, and in all this he violates no legal right of his creditors. The law allows even more than this. His first and most imperative duty is to support and maintain himself and family, from the proceeds of his labor. He is under no legal or moral obligation to appropriate these to the benefit of his creditors, and leave himself and his family to suffer hunger and want.[3] Consequently he has

[1] Dig. lib. 42 tit. 9, sec. 1; 1 Domat. B. 2 tit. 10.

[2] Moore v. Besse, 43 Cal. 511.

[3] Leslie v. Joyner, 2 Head, 514; Griffin v. Cranston, 1 Bosw. 281;

the right to enter into a contract to labor for another in consideration of the support and maintenance of himself and family.[1] If an attachment is laid in the hands of his employer after a contract has been partially performed, he may refuse to complete it, and a new arrangement may be made for the purpose of protecting his subsequent earnings from the effect of such attachment.[2] He is not permitted, however, to make an assignment of his future earnings with the intent to delay, hinder or defraud his creditors.[3]

Not apply Labor to Accumulation of Property.— Although the law will not compel a debtor to labor and earn money to pay his debts, yet there is a strong moral obligation resting upon him to use the strength, skill and talents with which he is endowed for that purpose, and this obligation is one which the law to a certain extent recognizes and enforces. He has an election to labor or not as he may please, with which the law will not interfere. He is also countenanced by the law in the proper discharge of his duty to provide a maintenance and support for himself and his family. But beyond the necessary wants of himself and his family, there is a limit which the law does not allow him to transcend. He is not permitted to treasure up a fund accruing from his labor or vocation whatever it may be, and claim that it

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s. c. 10 Bosw. 1; Holdship v. Patterson, 7 Watts, 547; Teeter v. Williams, 3 B. Mon. 562; Abbey v. Deyo, 43 N. Y. 343; s. c. 44 Barb. 374; Rush v. Vought, 55 Penn. 437; Comm v. Fletcher, 6 Bush. 171; Webster v. Hildreth, 33 Vt. 457.

[1] Leslie v. Joyner, 2 Head, 514; Tripp v. Childs, 14 Barb. 85; Holdship v. Patterson, 7 Watts, 547; Hoot v. Sorrell, 11 Ala. 386; Ashurst v. Given, 5 W. & S. 323; Hodges v. Cobb, 8 Rich. 50; Wheedon v. Champlin, 59 Barb. 61.

[2] Teeter v. Williams, 3 B. Mon. 562.

[3] Gragg v. Martin, 94 Mass. 498.

shall be protected for the benefit of himself or his family against the demands of creditors.[1] Every agreement or contrivance entered into with a view to deprive his creditors of his future earnings and enable him to retain and use them for his own benefit and advantage, or to make a permanent provision for his family, is fraudulent and void. Although his creditors can not compel him to labor for the purpose of satisfying their demands, yet they have a just claim in law upon the fruits of his labor performed.[2]

Business in Wife's Name.—According to the principles of the common law, the husband is liable for a contract to pay for property if it is made by his wife with his consent and the property is his, for her contract is null.[3] Hence if she carries on business in her own name, the business and the profits are his.[4] In many States laws have been passed removing the disability of a *feme covert* at common law and enabling her to hold her property free from liability for the debts of her husband, but even there if she has no separate estate he can not as against his creditors purchase property in her name and on her credit, control and manage it as her agent and pay for it by his own industry, thus investing the proceeds of his skill and labor in her name.[5] But where she owns

[1] Hamilton v. Zimmerman, 5 Sneed, 39.

[2] Tripp v. Childs, 14 Barb. 85; Patterson v. Campbell, 9 Ala. 933; Waddingham v. Loker, 44 Mo. 132; *vide* Isham v. Schaffer, 60 Barb. 317; Hodges v. Cobb, 8 Rich. 50,

[3] Glann v. Younglove, 27 Barb. 480; Robinson v. Wallace, 39 Penn. 129.

[4] Quidort v. Pergeaux, 18 N. J. Eq. 472.

[5] Bucher v. Ream, 68 Penn. 421; Hallowell v. Horter, 35 Penn. 375; Barringer v. Stower, 49 Penn. 129; Robinson v. Wallace, 39 Penn. 129; Hoffman v. Toner, 49 Penn. 231; Hall v. Sroufe, 52 Ill. 421; Keeney v. Good, 21 Penn. 349; Rankin v. West, 25 Mich. 195; Penn. v. Whiteheads, 12 Gratt. 74; Shepherd v. Hill, 6 Lans. 387; Pawley v. Vogel, 42 Mo. 291; Glidden v. Taylor, 16 Ohio St. 509; Robinson v. Brenns, 90 Ill. 351. *Contra*, Knapp v. Smith, 27 N. Y. 277; Baugh v. Monaghan, 2 Phila. 90.

and manages the business, she may buy property on credit and employ him as her agent.[1] Yet even then the labor and skill of the husband must not be so mixed up with hers that they can not be separated, for if they are, the business will be considered as his and the proceeds will not be protected for her as against his creditors.[2] If property is purchased upon the joint note of the debtor and his wife, and conveyed to her, it will be liable to his creditors if the note is paid by him.[3] If she has a separate estate she may employ him and compensate him for his services.[4] Such employment, however, must be in good faith, and not merely colorable.[5] If the character of an agent is assumed in an improper case, the law disregards it. An arrangement by which the husband acts as his wife's agent without any compensation, or for a compensation that is insufficient, is, in effect, an attempt to make a voluntary conveyance of the products of his skill and

[1] Manderbach v. Mock, 29 Penn. 43; Rankin v. West, 25 Mich. 195.

[2] National Bank v. Sprague, 20 N. J. Eq. 13; Quidort v. Pergeaux, 18 N. J. Eq. 472; Pawley v. Vogel, 42 Mo. 291; Lyman v. Place, 26 N. J. Eq. 30; Alt v. Lafayette Bank, 9 Mo. Ap. 91.

[3] McLaran v. Mead, 48 Mo. 115; Coffin v. Morrill, 22 N. H. 352; Dick v. Hamilton, 1 Deady, 322.

[4] Knapp v. Smith, 27 N. Y. 277; Voorhis v. Bonesteel, 16 Wall. 16; s. c. 7 Blatch. 495; Gage v. Dauchy, 34 N. Y. 293; s. c. 28 Barb. 622; Feller v. Alden, 23 Wis. 301; Savage v. O'Neil, 44 N. Y. 298; Buckley v. Wells, 33 N. Y. 518; s. c. 42 Barb. 569; Welch v. Kline, 57 Penn. 428; Kluender v. Lynch, 4 Keyes, 361; s. c. 2 Abb. 538; Bellows v. Rosenthal, 31 Ind. 116; Dean v. Bailey, 50 Ill. 481; Merchant v. Bunnel, 3 Abb. Ap. 280; Wheedon v. Chaplin, 59 Barb. 61; Vrooman v. Griffith, 4 Abb. Ap. 505; Driggs v. Russell, 3 N. B. R. 161; *in re* Eldred, 3 N. B. R. 256; Bennett v. Stout, 98 Ill. 47; Tresch v. Wirtz, 34 N. J. Eq. 134; Aldridge v. Muirhead, 101 U. S. 397; s. c. 14 N. B. R. 249.

[5] Knapp v. Smith, 27 N. Y. 277; Gage v. Dauchy, 34 N. Y. 293; s. c. 28 Barb. 622; Savage v. O'Neil, 43 N. Y. 298; O'Leary v. Walter, 10 Abb. Pr. (N. S.) 439; Wortman v. Price, 47 Ill. 22; Hurlburt v. Jones, 25 Cal. 225; Laing v. Cunningham, 17 Iowa, 510; Woodworth v. Sweet, 51 N. Y. 8; s. c. 44 Barb. 268; Brownell v. Dixon, 37 Ill. 197.

labor in her favor, and is void as against his creditors.[1] An employment of the husband does not, however, even in such a case divest her title and render the proceeds of the business liable to his creditors at law.[2] If she owns land and manages it for her own use and benefit, she may permit him in the enjoyment of the marital relation to live upon it without rendering the products liable at law to his creditors on account of the labor which he voluntarily bestows upon it. The ownership of the soil carries with it the right to the products, and the labor of others though mingling in the production does not create any title to them. It matters not whether the owner owes for the labor, or obtains it without a required equivalent, or for an equivalent in maintenance which is consumed in the use, the title to the product of the tillage is not thereby changed.[3] A debtor may therefore bestow his skill and labor upon his wife's estate so far as may be reasonably necessary, without rendering the products liable to his creditors.[4] He may do even more than that. As his first obligation is to support his family, the products of the land will not be liable for his debts until that obligation is discharged,[5] and even then they will not be liable unless the portion not needed for the support of the family is the result of his labor.[6] But if there is any such

[1] Glidden v. Taylor, 16 Ohio St. 509; Feller v. Alden, 23 Wis. 301; Shackelford v. Collier, 6 Bush, 149; Comm v. Fletcher, 6 Bush, 171; Penn v. Whiteheads, 12 Gratt. 74; Pawley v. Vogel, 42 Mo. 291; Wilson v. Loomis, 53 Ill. 352. *Contra*, Ashurst v. Given, 5 Wis. 323; Gillespie v. Miller, 37 Penn. 247.

[2] Buckley v. Wells, 33 N. Y. 518; s. c. 42 Barb. 569; White v. Hildreth, 25 Vt. 265; Webster v. Hildreth, 33 Vt. 457.

[3] Rush v. Vought, 55 Penn. 437; Dick v. Hamilton, 1 Deady, 322; Gage v. Dauchy, 34 N. Y. 293; s. c. 28 Barb. 622.

[4] Comm v. Fletcher, 6 Bush, 171; Shackelford v. Collier, 6 Bush, 149.

[5] Comm v. Fletcher, 6 Bush, 171.

[5] Comm v. Fletcher, 6 Bush, 171.

surplus that is the result of his skill, there is no reason why it may not be reached in equity and appropriated towards the payment of his debts.[1]

WIFE'S EARNINGS.—At common law, a husband is entitled to all the property which the wife acquires by skill or labor during coverture. His right to her services and her earnings is absolute.[2] Although he may vest her with a separate estate in her future earnings, yet he can not do so to the prejudice of existing creditors.[3] But if he allows her to labor upon real estate owned by her, this will not render the products liable to levy under an execution against him.[4]

CHILD'S EARNINGS.—A parent by law is entitled to the earnings of his minor child. This right arises out of his obligation to support and educate the child, and this responsibility is one from which he cannot absolve himself. As his power over the child's earnings arises from his duty to support and educate the child, it is commensurate with it. As long as the responsibility continues, the power over the child continues also.[5] As the right of the

[1] Shackelford v. Collier, 6 Bush, 149.

[2] Skillman v. Skillman, 13 N. J. Eq. 403; Belford v. Crane, 16 N. J. Eq. 265; Cramer v. Reford, 17 N. J. Eq. 367; Shackleford v. Collier, 6 Bush, 149; Cropsey v. McKinney, 30 Barb. 47; Beach v. Baldwin, 14 Mo. 597; Pinkston v. McLemore, 31 Ala. 308; Duncan v. Roselle, 15 Iowa, 501; Fitzpatrick v. Borbridge, 2 Brews. 559; Keith v. Woombell, 25 Mass. 211; Apple v. Ganong, 47 Miss. 189. *Contra*, Stall v. Fulton, 30 N. J. 430; Peterson v. Mulford, 36 N. J. 481; Tresch v. Wirtz, 34 N. J. Eq. 124.

[3] Pinkston v. McLemore, 31 Ala. 308; McLemore v. Knuckolls, 37 Ala. 662; Hinman v. Parkis, 33 Conn. 188; Ewing v. Gray, 12 Ind. 64; Johnson v. Glenn, 18 Wall. 476; Basham v. Chamberlain, 7 B. Mon. 443; Glaze v. Blake, 56 Ala. 379. *Contra*, Peterson v. Mulford, 36 N. J. 481.

[4] Johnson v. Vail, 14 N. J. Eq. 423.

[5] Swartz v. Hazlitt, 8 Cal. 118; Brown v. McDonald, 1 Hill Ch. 297; Dick v. Grissom, 1 Frem. Ch. (Miss.) 428; Danley v. Rector, 10 Ark. 211.

parent, however, arises out of his obligation to support and educate the child, such earnings are subject in the first instance to a charge for that purpose, and no creditor has a right to have them applied to the payment of his debt to the exclusion of a proper education and maintenance.[1] If, therefore, the father emancipates the child and allows him to provide for his own support and education by his own labor, he does not withdraw from his creditors any property or fund to which they are legally or justly entitled for the payment of their demands.[2] The child is not in law regarded as an ordinary debtor to his father, nor is the father's right to the child's services regarded in law as mere property either in possession or in action.[3] It must, however, distinctly appear that there has been a mutual abandonment of the rights and duties of parent and child, and a relinquishment of all the property in the child's earnings, or they can not be protected from the parent's creditors.[4] But the emancipation of the child from the parent's control may be as perfect when they both live together under the same roof as if they were separated.[5] Marriage is of itself a legal emancipation and entitles the child to the proceeds of his labor independent of any act of emancipation on the part of the parent, and if the parent then contracts to pay him for his services, he is bound to do so and creditors can not complain.[6]

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[1] Lord v. Poor, 23 Me. 569; Leslie v. Joyner, 2 Head, 514.

[2] Lord v. Poor, 23 Me. 569; Manchester v. Smith, 29 Mass. 113; Jenison v. Graves, 2 Blackf. 440; U. S. v. Mertz, 2 Watts, 406; McCloskey v. Cyphert, 27 Penn. 220; Chase v. Elkin, 2 Vt. 290; Bray v. Wheeler, 29 Vt. 514; Bobo v. Bryson, 21 Ark. 387; Lyon v. Bolling, 14 Ala. 753; Johnson v. Vail, 14 N. J. Eq. 423; Atwood v. Holcomb, 39 Conn. 270; Partridge v. Arnold, 73 Ill. 600; Rouns v. Dunnigan, 71 Mo. 148.

[3] Attwood v. Holcomb, 39 Conn. 270.

[4] U. S. v. Mertz, 2 Watts, 406.

[5] McCloskey v. Cyphert, 27 Penn. 220.

[6] Dick v. Grissom, 1 Freem. Ch. (Miss.) 428.

CHARACTER OF CONVEYANCE.—The withering influence of the statute extends to all feoffments, gifts, grants, alienations, bargains and conveyances, and all bonds, suits, judgments and executions, and the principles of the common law will embrace every device not enumerated in the statute. Every description of contract, and every transfer or conveyance of property, by what means soever it is done, is vitiated by fraud. Whether the contract is oral or in writing; whether executed by the parties with all the solemnities of deeds by seal[1] and acknowledgment; whether in the form of the judgment of a court, stamped with judicial sanction,[2] or carried out by the device of a corporation organized with all the forms and requirements demanded by any statute, if it is contaminated with fraud, the law declares it to be a nullity. Deeds, obligations, contracts, judgments, and even corporate bodies may be the instruments through which parties may obtain the most unrighteous advantages. All such devices and instruments have been resorted to for the purpose of covering up fraud, but whenever the law is invoked all such instruments are declared nullities. They are a perfect dead letter. The law looks upon them as if they had never been executed. They can never be justified or sanctified by any new shape or course, by forms or recitals, by covenants or sanctions, which the ingenuity or skill or genius of the rogue may devise.[3] The transfer must, however, be capable in point of law of executing or aiding in the execution of an illegal purpose.[4]

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[1] Garretson v. Kane, 27 N. J. 208.

[2] Wilhelmi v. Leonard, 13 Iowa, 330; Hackett v. Manlove, 14 Cal. 85; McFarland v. Bain, 33 N. Y. Supr. 38.

[3] Booth v. Bunce, 33 N. Y. 139; s. c. 24 N. Y. 592; s. c. 35 Barb. 496; Curtis v. Leavitt, 15 N. Y. 9; s. c. 17 Barb. 309.

[4] Heydock v. Stanhope, 1 Curt. 471.

BAILMENT.—The statute has no application to a mere bailment, a simple delivery of possession, for the plain reason that such enactment would be useless. The statute is intended to remove obstructions out of the way of creditors, but in cases of bailment the apparent and real condition of the title is the same. No title is put in another which is at all in the way of creditors. If they can find the property in the hands of the bailee, they can just as readily subject it to execution as though it remained with the debtor. It does not concern them whether the bailment is made from good or bad motives.[1]

MODE IMMATERIAL.—If a tenant commits a forfeiture[2] or surrenders his term[3] to the end that the reversioner may enter for the purpose of defrauding his creditors, it is a fraudulent conveyance. Where a judgment is given against a party and he suffers himself to be outlawed in felony with the intent to defraud his creditors and afterwards purchases a pardon and has restitution, his goods are still liable to execution on account of the fraud.[4] If a contract is fraudulently rescinded, it will be deemed to be still in force.[5] A fraudulent cancellation of an indebtedness will not discharge the debt.[6] A note for a debt taken in the name of another is, as far as creditors are concerned, an assignment of the debt.[7] A liability, however, which

[1] Gowan v. Gowan, 30 Mo. 472.

[2] Anon. Vent. 257.

[3] Westlake v. Ridout, 5 Taunt. 519.

[4] Beverly's Case, 2 Dyer, 245, c. note; Verney's Case, 2 Dyer, 245, b.; s. c. Coke on Lit. 290, b.

[5] Maloney v. Bewley, 10 Heisk. 642.

[6] Martin v. Root, 17 Mass. 222; Everett v. Read, 3 N. H. 55; McGay v. Keilback, 14 Abb. Pr. 142; Wise v. Tripp, 13 Me. 9; Wright v. Petrie, 1 S. & M. Ch. 282.

[7] Reppy v. Reppy, 46 Mo. 571; Freeman v. Burnham, 36 Conn. 469; Camp v. Scott, 14 Vt. 387; Marsh v. Davis, 24 Vt. 363; Brown v. Matthaus, 14 Minn. 205; Rogers v. Jones, 1 Neb. 417.

is still *in fieri* and a mere contingent obligation may be cancelled, rescinded or discharged.[1] If the setting up and recording of a deed long after its date is merely colorable, the deed is void.[2] If a debtor makes a fraudulent conveyance and at the same time obtains a reconveyance which he keeps from record in order to cover up the title, the transaction may be set aside.[3] A lease which is intended as a mere cover to enable the debtor to secure the crops on the premises is void.[4] If a mortgagor who has made a conveyance of the equity of redemption subsequently pays the mortgage, the payments may be reached.[5] A remission of a portion of rent that is due in an unfavorable year in good faith, is merely yielding up that which an enlarged sense of justice requires shall not be exacted.[6] A tenant in tail may disentail the property and resettle it, leaving the same estate to himself as he had before, and the deed will not be fraudulent, for the creditors have the same remedies, as far as he is concerned, which they had before, namely, the power of going against his life estate.[7]

CONTRACTS RELATING TO LAND.—A written contract for the purchase of land upon which nothing has been paid may be cancelled, and the property conveyed by the owner to another for a valuable consideration.[8] If something has been paid which will be lost by a non-compliance with the contract, another may pay the balance in good

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[1] McGay v. Keilback, 14 Abb. Pr. 142.
[2] Lasher v. Stafford, 30 Mich. 369. [3] Lewis v. Lamphere, 79 Ill. 187.
[4] Ingraham v. Rankin, 47 Wis. 406.
[5] Oliver v. Moore, 23 Ohio St. 473. [6] Andrews v. Jones, 10 Ala. 400.
[7] Clements v. Eccles, 11 Ir. Eq. 229.
[8] Raffensberger v. Collison, 28 Penn. 426.

faith and take the title.[1] An oral contract in which there has been a part payment does not vest any interest in the debtor, which is liable to an execution at law, and if he surrenders or transfers his bargain, the property will not be liable.[2] But if a surrender is fraudulently made, the creditors may recover the money so paid.[3]

Assignment of Liens.—An assignment of a mortgage in consideration of money paid by the debtor, if made in fraud, is equivalent to a payment and cancellation of it.[4] A redemption of land sold under an execution by virtue of a transfer of the right to redeem, and a deed in the name of the grantee, leaves the title as against creditors in the debtor if it is made fraudulently with his money.[5] The same result follows if the debtor, instead of redeeming, allows the sale to stand, and gives money to another to take an assignment of the sheriff's certificate.[6]

Dissolution of a Partnership.—Although the creditors of a partnership have, in certain cases, a privilege or preference to have the debts due to them paid out of the partnership assets to the exclusion of the individual creditors of the several partners, yet this is mainly a derivative right, being practically a subrogation to the equity of the individual partners to have the partnership property applied to the payment of the partnership debts, in pre-

[1] Pusey v. Harper, 27 Penn. 469.

[2] Miller v. Specht, 11 Penn. 449; Jackson v. Scott, 18 Johns. 94; Botts v. Cozine, Hoffm. 79; *vide* Bean v. Brackett, 34 N. H. 102.

[3] Alexander v. Tams, 13 Ill. 221; Botts v. Cozine, Hoffm. 79.

[4] Stephens v. Sinclair, 1 Hill, 143; Thompson v. Van Vechten, 27 N. Y. 568; s. c. 5 Abb. Pr. 458; s. c. 6 Bosw. 373; Remington Paper Co. v. O'Dougherty, 81 N. Y. 474; McMarter v. Campbell, 41 Mich. 513.

[5] Legro v. Lord, 10 Me. 191; Goff v. Dabbs, 4 Baxter, 300.

[6] Rankin v. Arndt, 44 Barb. 251.

ference to those of any individual partner.[1] In their own right they have no lien on the partnership assets, and hence can not interfere with any disposition that is made of them for a valuable consideration and in good faith.[2] If the partners, therefore, dissolve the partnership in good faith and divide the partnership assets among themselves,[3] or transfer them all to one partner,[4] the partnership creditors have no right to priority of payment out of the assets so divided or transferred. After such a division or transfer a partner may use the assets to pay his individual debts, and such use is not a violation of the rights of the partnership creditors.[5] This power of the partners must, however, be exercised in good faith, otherwise it will be void. A *bona fide* transmutation of partnership property into individual property is understood to be the act of men acting fairly in winding up the partnership.[6] If the dissolution of the partnership is not made in good faith, but for the purpose of diverting the partnership assets from the partnership creditors to the individual

[1] Case v. Beauregard, 99 U. S. 119.

[2] Howe v. Lawrence, 63 Mass. 553; Allen v. Center Valley Co., 21 Conn. 130; Hapgood v. Cornwell, 48 Ill. 68.

[3] Case v. Beauregard, 99 U. S. 119; Allen v. Center Valley Co., 21 Conn. 130; Kimball v. Thompson, 54 Mass. 283.

[4] *Ex parte* Ruffin, 6 Ves. Jr. 119; *ex parte* Peake, 1 Madd. 346; *ex parte* Fell, 10 Ves. Jr. 347; *ex parte* Williams, 11 Ves. Jr. 3; McNutt v. Hobson, 39 Penn. 269; Smith v. Edwards, 7 Humph. 106; Robb v. Mudge, 80 Mass. 534; Howe v. Lawrence, 63 Mass. 553; *ex parte* Rowlandson, 1 Rose, 416; Ladd v. Griswold, 9 Ill. 25; Shimer v. Huber, 19 N. B. R. 414.

[5] Case v. Beauregard, 99 U. S. 119; Rankin v. Jones, 2 Jones Eq. 169; Hapgood v. Cornwell, 48 Ill. 68; Goembell v. Arnett, 100 Ill. 34; Wilcox v. Kellogg, 11 Ohio, 394; Baker's Appeal, 21 Penn. 76; Armstrong v. Fahnestock, 19 Md. 58; Dimon v. Hazard, 32 N. Y. 65; Bullett v. Chartered Fund, 26 Penn. 108; Sage v. Chollar, 21 Barb. 596; Pfirman v. Koch, 1 Cin. 460.

[6] *Ex parte* Ruffin, 6 Ves. Jr. 119.

creditors, then it is fraudulent and the partnership creditors are entitled to priority of payment out of the assets,[1] even though they may have been transferred to pay individual debts.[2] In such case the insolvency of the partnership is a fact that may be considered in determining whether the dissolution is in good faith or not.[3] A dissolution of a partnership and a division of the assets among the partners according to their respective interests are not fraudulent, although the object of such division is to prevent the individual creditors of one partner from levying upon the partnership property.[4] But if the object of the dissolution is to delay, hinder or defraud the individual creditors of one partner, then it is void.[5]

FRAUDULENT JUDGMENT.—The forms of the law do not constitute a protection against fraud, or give validity to a transfer when good faith is absent. The statute was designed to leave property open to the free course of the law and to keep impediments out of the way of creditors. It was foreseen that a debtor, knowing that the cause of a creditor and the means afforded him for the recovery of his debt are held sacred, might, and probably would, endeavor to take protection under it and surround himself with the formalities of the law and the rights of the creditor. To guard against this and to prevent the law

[1] *In re* Owen Byrne, 1 N. B. R. 464; s. c. 16 A. L. Reg. 499; *in re* Francis Tomes, 19 N. B. R. 36; Collins v. Hood, 4 McLean, 186; *in re* Cook & Gleason, 3 Biss. 122.

[2] Person v. Monroe, 21 N. H. 462; Tracy v. Walker, 1 Flippin, 41; Phelps v. McNeely, 66 Mo. 554; David v. Birckard, 53 Wis. 492; Collins v. Hood, 4 McLane, 186; *ex parte* Benjamin Mayou, 4 De G. J. & S. 664; Sanderson v. Stockdale, 11 Md. 563; Flack v. Charron, 29 Md. 311; Anderson v. Maltby, 4 Bro. Ch. 423.

[3] Shimer v. Huber, 19 N. B. R. 414; Frank v. Peters, 9 Ind. 344.

[4] Atkins v. Saxton, 77 N. Y. 195.

[5] Burrill v. Lowry, 18 N. B. R. 367; Weaver v. Ashcroft, 50 Tex. 427.

from becoming the shield of fraud, the statute was extended to judgments, executions and every other mode of transfer which is not *bona fide*.[1]

SALES UNDER FRAUDULENT JUDGMENTS OR MORTGAGES. An intention to delay, hinder or defraud creditors will invalidate a public as well as a private sale, for the mere form of the transfer can not give it validity. The law requires that a debtor's property shall be devoted to the payment of his debts, and does not tolerate any subterfuge or device which is intended to divert it from that purpose. A sale which is effected by fraud is no sale, and constitutes no impediment to creditors in subjecting the property to their debts.[2] A fraudulent judgment[3] or attachment,[4] therefore, with an execution and sale thereunder, confers no title on a purchaser who is a party to the fraud, whether he is the ostensible judgment or attaching creditor[5] or some other person.[6] Even though a judgment[7] or mortgage[8] was originally recovered or given in

[1] Yoder v. Standiford, 7 Mon. 478; Beattie v. Pool, 13 S. C. 379; Shainwald v. Lewis, 6 Fed. Rep. 753; s. c. 6 Saw. 556; Shallcross v. Deats, 43 N. J. 177; Mulford v. Stratton, 41 N. J. 466.

[2] Hammock v. McBride, 6 Geo. 178; Pennington v. Chandler, 5 Harring. 394; Ansley v. Carlos, 8 Ala. 900; s. c. 9 Ala. 973; Bentley v. Heiutze, 33 N. J. Eq. 405.

[3] Burnell v. Johnson, 9 Johns. 243; Christopherson v. Burton, 3 Exch. 160; s. c. 18 L. J. Exch. 60; Boardman v. Keeler, 1 Aik. 158; Metropolitan Bank v. Durant, 22 N. J. Eq. 35; Hammock v. McBride, 6 Geo. 178; Pennington v. Chandler, 5 Harring. 394.

[4] Briody v. Conro, 42 Cal. 135.

[5] Burnell v. Johnson, 9 Johns. 243; Boardman v. Keeler, 1 Aik. 158; Hammock v. McBride, 6 Geo. 178.

[6] Christopherson v. Burton, 3 Exch. 160; s. c. 7 L. J. Exch. 60.

[7] Gibbs v. Neely, 7 Watts, 305; Serfoss v. Fisher, 10 Penn. 184; Floyd v. Goodwin, 8 Yerg. 484; Stephens v. Barnett, 7 Dana, 257; Remington Paper Co. v. O'Dougherty, 81 N. Y. 474.

[8] Warner v. Blakeman, 4 Abb. Ap. 530.

good faith for a real debt, yet if it is kept on foot for fraudulent purposes after it has been satisfied, it comes within the statute as effectually as if it had been originally contrived to delay, hinder or defraud creditors. The character of the device is referred to the time when it is used for the purpose of fraud, and if then false and feigned, it is fully within the interdict of the statute and the provisions of the common law, for that which is true in its origin may become foul by subsequent events.

PURCHASES AT PUBLIC SALES WITH DEBTOR'S MONEY.—A public sale may be void although it is made in satisfaction of a real debt, and the creditor is innocent of the guilty scheme, and ignorant that he is made subservient to its execution. The advantage obtained by an honest creditor can not protect the intent with which other parties act from investigation, or confirm those parts of the transaction by which they would acquire or reserve valuable interests, nor can his innocence purge their bad faith.[1] If the debtor, for instance, at a public sale under a mortgage[2] or an execution,[3] advances the money with which another purchases the property, there is as against creditors no sale. The transaction, it is true, assumes the form of a public sale, but this is a fiction. The form is

[1] Dobson v. Erwin, 1 Dev. & Bat. 569; s. c. 4 Dev. & Bat. 201; Yoder v. Standiford, 7 Mon. 478.

[2] Gutzwiller v. Lackman, 23 Mo. 168.

[3] Morris v. Allen, 10 Ired. 203; Abney v. Kingsland, 10 Ala. 355; Payne v. Craft, 7 W. & S. 458; Hays v. Heidelberg, 9 Penn. 203; Griffin v. Wardlaw, 1 Harper Eq. 481; Dobson v. Erwin, 1 Dev. & Bat. 569; s. c. 4 Dev. & Bat. 201; Miller v. Fraley, 21 Ark. 22; Rankin v. Arndt, 44 Barb. 251; Stovall v. Farmers' Bank, 16 Miss. 305; Duncan v. Forsyth, 3 Dana, 229; Brown v. M'Donald, 1 Hill Ch. 297; Cumming v. Fryer, Dudley, 182; Ewing v. Gray, 12 Ind. 64; Marriott v. Givens, 8 Ala. 694; McBride v. Thompson, 8 Ala. 650; Goodwin v. Goodwin, 20 Geo. 600; Hubbard v. Allen, 59 Ala. 283; Fulton v. Woodman, 54 Miss. 158.

merely apparent, not real. There is in such a case no distinction between a conveyance directly from the debtor and one from the sheriff or other public officer. In reality the conveyance is from the debtor through the sheriff or other public officer. It gives to the dealing the semblance of fairness, but nothing more than the semblance. It does not make it fair, though it increases the difficulty of detecting its unfairness, but when detected, that avoids this as well as other transfers, however solemn. It is substantially as much a sale *inter partes* as if there were no intervention of the sheriff or other public officer. If the money is not paid at the time, but is furnished afterwards, the same principle applies, as, for instance, if the purchaser receives the money from the debtor before the execution of the deed,[1] or if the plaintiff in the execution is the purchaser at the sale and gives no credit for the proceeds, and afterwards receives full satisfaction of his debt in another way.[2] Where a part of the money is advanced by the purchaser and a part by the debtor, the transaction depends on the actual intent of the parties. If there is no deception, but open dealing, the purchaser may take a deed in his own name to secure his advance.[3] But if there is an intent to delay, hinder or defraud creditors, then, although the purchaser may advance a portion of the money, yet if he takes a deed with the intent to claim the estate absolutely as against other creditors, his own advances can not rescue it from the legal consequences of the corrupt combination.[4] If a

[1] Griffin v. Wardlaw, 1 Harper Eq. 481.

[2] Schott v. Chancellor, 20 Penn. 195; s. c. 23 Penn. 68.

[3] Hawkins v. Sneed, 3 Hawks, 149; Dobson v. Erwin, 1 Dev. & Bat. 569; s. c. 4 Dev. & Bat. 201.

[4] Dobson v. Erwin, 1 Dev. & Bat. 569; s. c. 4 Dev. & Bat. 201; Burke v. Murphy, 27 Miss. 167; Ewing v. Gray, 12 Ind. 64.

party buys the property under an execution with an understanding to hold it for the benefit of the debtor and the debtor repays the money, it may be reached.[1] If the person who buys the property is not a party to any fraudulent purpose, his purchase is valid although the debtor gave money to another to buy it.[2]

FRAUDULENT PUBLIC SALES WHERE THE MONEY IS PAID BY OTHERS.—A public sale to the highest bidder, under a mortgage[3] or an execution,[4] may be fraudulent although the purchaser advances all the money, for it constitutes no protection against fraud, but is frequently used to deceive creditors on account of its apparent publicity and fairness, and because it appears to be the act of the law and not of the debtor. It moreover has the advantage of being a convenient mode of selling the property for an inadequate consideration, by reason of the sacrifice that usually attends such a sale. The circumstance that the purchaser pays his own money is evidence that the sale is *bona fide*, but is not conclusive,[5] for if there is a combination between the purchaser and the debtor to have the

[1] Ward v. Lamberth, 31 Geo. 150; Trimble v. Turner, 21 Miss. 348.

[2] Sharpe v. Williams, 76 N. C. 87.

[3] Hawkins v. Allston, 4 Ired. Eq. 137; Overton v. Morris, 3 Port. 249; Beeler v. Bullett, 3 A. K. Marsh. 280; Garland v. Rives, 4 Rand. 282; Lipperd v. Edwards, 39 Ind. 165; Roach v. Deering, 17 Miss. 316; Bickley v. Norris, 2 Brev. 252; Compton v. Perry, 23 Tex. 414; Thomson v. Hester, 55 Miss. 656.

[4] Morris v. Allen, 10 Ired. 203; Brodie v. Seagrave, Taylor, 144; Foulk v. M'Farlane, 1 W. & S. 297; Stephens v. Barnett, 7 Dana, 257; Pennington v. Chandler, 5 Harring. 394; White v. Trotter, 21 Miss. 30; Stovall v. Farmers' Bank, 16 Miss. 305; Duncan v. Forsyth, 3 Dana, 229; Forrest v. Camp, 16 Ala. 642; Dick v. Cooper, 24 Penn. 217; Ansley v. Carlos, 9 Ala. 973; S. C. 8 Ala. 900; Crary v. Sprague, 12 Wend. 41; Yoder v. Standiford, 7 Mon. 478; Ward v. Lamberth, 31 Geo. 150; Kilby v. Haggin, 3 J. J. Marsh. 208; Trimble v. Turner, 21 Miss. 348.

[5] Morris v. Allen, 10 Ired. 203.

property sold for less than its value, in order that the debtor may derive some advantage therefrom, the sale is fraudulent and void as against other creditors. Creditors have a right to demand that the full value of the debtor's property shall be applied to the payment of his debts, and any contrivance to procure a sale for an inadequate consideration defeats their just rights, for the excess of the value over the price is thus transferred indirectly, without a valuable consideration.[1] When the property, or any part of it, moreover, is held in secret trust for the debtor, the sale is calculated to baffle creditors, for the title is ostensibly put out of the debtor and vested in the purchaser, apparently for the sole use of the latter, so as to exempt it from execution, but really for the use of the debtor.[2]

The mode of carrying out the combination is immaterial. It may be by an insufficient advertisement,[3] or some unusual clause in the advertisement,[4] or by tearing down advertisements that have been put up,[5] or by an agreement that the sale shall be made without any advertisement,[6] or by bringing the sale on by surprise, and thus either preventing a general knowledge of it, or making it impossible for a distant creditor whom it is designed to defeat to be present,[7] or by selling the property in large parcels or blocks or *en masse*,[8] or by inducing others not to

[1] Stovall v. Farmers' Bank, 16 Miss. 305; Hawkins v. Allston, 4 Ired. Eq. 137.

[2] Hawkins v. Allston, 4 Ired. Eq. 137; Ries v. Rowland, 11 Fed. Rep. 657.

[3] Gibbs v. Neely, 7 Watts, 305; Smith v. Schwed, 9 Fed. Rep. 483.

[4] Metropolitan Bank v. Durant, 22 N. J. Eq. 35.

[5] Morris v. Allen, 10 Ired. 203; Kilby v. Haggin, 3 J. J. Marsh. 208; Mechanics' Nat'l Bank v. Burnet Manuf. Co., 33 N. J. Eq. 483.

[6] Morris v. Allen, 10 Ired. 203.

[7] Morris v. Allen, 10 Ired. 203.

[8] Yoder v. Standiford, 7 Mon. 478; White v. Trotter, 21 Miss. 30; Trimble v. Turner, 21 Miss. 348; Stephens v. Barnett, 7 Dana, 257; Brodie v. Seagraves, Taylor, 144; Metropolitan Bank v. Durant, 22 N. J.

bid.[1] Whatever may be the mode, the sale will be void if there is an intent on the part of the purchaser and the debtor to delay, hinder, or defraud creditors. There are, however, some acts on the part of the purchaser which have been held not to be fraudulent in themselves It has been decided that a man who has a deed or mortgage covering the property, may give notice of it at the sale, and purchase the property at a reduced price, although he intends by the notice to get the property for a less price than it would otherwise have sold for;[2] but such a notice is so manifestly calculated to deter bidders, that it will render the sale void if there is any concert between the purchaser and the debtor to create a secret trust for him.[3] It has also been held that a statement by the purchaser at the sale that he intends to give the benefit of the purchase to the debtor will not of itself make the sale void, although a bidder in consequence thereof refrained from bidding; for it is lawful to do such an act, and it can not be wrong for a man to say openly and candidly that he intends to do it.[4] But although it may not be fraudulent of itself, yet it may be evidence that the sale is not *bona fide*, especially if there is a previous agreement between the purchaser and the debtor. For every man whose property is offered for sale is naturally disposed to get the most for it that he can, and to use some exertions to collect bidders, in order to make it go as high as possible,

Eq. 35; Smith v. Schwed, 9 Fed. Rep. 483; Cox v. Miller, 54 Tex. 16; Mechanics' Nat'l Bank v. Burnet Manuf. Co., 33 N. J. Eq. 483.

[1] Yoder v. Standiford, 7 Mon. 478; Kilby v. Haggin, 3 J. J. Marsh. 208; Trimble v. Turner, 21 Miss. 348; Stovall v. Farmers' Bank, 16 Miss. 305; Foulk v. M'Farlane, 1 W. & S. 297; Smith v. Schwed, 9 Fed. Rep. 483.

[2] Costillo v. Thompson, 9 Ala. 937.

[3] Ansley v. Carlos, 9 Ala. 973; s. c. 8 Ala. 900.

[4] Dick v. Cooper, 24 Penn. 217.

and thus reduce his indebtedness. Although he may not be bound to aid in getting a good price for the property, yet an agreement for his own benefit which restrains him from doing so, and keeps his friends from bidding, manifestly tends to suppress competition, and thus injure creditors and defraud them of their rights.[1] When the purchaser acts as agent for both debtor and creditor in the control of the sale, it may be set aside at the instance of another creditor, if there is any inadequacy in the price.[2] There are some acts that may be done for the benefit of the debtor, provided that they are done in good faith.[3] A son may purchase his father's land as the highest bidder, in order to provide a home and subsistence for him.[4] A mere agreement by the purchaser to allow the debtor's wife to buy the property upon paying the debt due to him and the price he gives for it, does not make the purchase fraudulent.[5] A party who intends to become a purchaser may agree to aid a creditor to make his debt if the latter will give a portion of it to the debtor's wife.[6] A judgment creditor may agree to aid the debtor to sell the property for a higher price and apply the profits to satisfy the judgment.[7] It has also been held that a purchaser will not be affected by the means taken by others to prevent rival bidding, if he had no agency therein.[8]

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[1] Morris v. Allen, 10 Ired. 203. [2] White v. Trotter, 21 Miss. 30.
[3] Jackson v. Brownell, 3 Caines, 222. [4] Morris v. Allen, 10 Ired. 203.
[5] Heintze v. Bentley, 34 N. J. Eq. 562.
[6] Kilby v. Haggin, 3 J. J. Marsh. 208.
[7] Ragland v. Cantrell, 49 Ala. 294.
[8] Kilby v. Haggin, 3 J. J. Marsh. 208; Thorpe v. Beavans, 73 N. C. 241.

CHAPTER XI.

VOLUNTARY CONVEYANCES.

Definition of Voluntary Conveyance.—A voluntary conveyance is a conveyance without any valuable consideration. The adequacy of the consideration does not enter into the question. The character of purchase or voluntary is determined by the fact whether anything valuable passes between the debtor and the grantee as a consideration for the transfer. If there is a valuable consideration, no matter how trivial or inadequate, the conveyance is not voluntary.[1] But if there is no valuable consideration, the conveyance is subject to the law relating to voluntary conveyances, no matter what the form may be, or whether it proceeded from the free will of the grantor or was made at the instance of others.[2] The doctrine of voluntary conveyances, moreover, applies only to transfers that are made with actual good faith. If there is an actual intent to hinder, delay, or defraud creditors, on the part of the grantor, then the law relating to fraudulent conveyances,[3] as distinguished from mere voluntary conveyances, is applicable.

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[1] Jackson v. Peek, 4 Wend. 300; Shontz v. Brown, 27 Penn. 123; Washband v. Washband, 27 Conn. 424; Seward v. Jackson, 8 Cow. 406; s. c. 5 Cow. 67; Dygert v. Remerschneider, 32 N. Y. 629; s. c. 39 Barb. 417.

[2] Cornish v. Clark, L. R. 14 Eq. 184.

[3] Gruber v. Boyles, 1 Brev. 266; Beecher v. Clark, 10 N. B. R. 385; s. c. 12 Blatch. 256; Fox v. Moyer, 54 N. Y. 125.

INTENT OF DONOR ALONE.—It follows from the definition of a voluntary conveyance that the question in regard to its validity or invalidity depends upon the intent of the party making it, and not on the motive with which it is received. The proviso at the end of the statute only extends to transfers made upon a good consideration, and it has long been settled that the only consideration which is good within the meaning of the statute is a valuable consideration.[1] It is the innocent purchaser and not the innocent donee that is protected. The only question is *quo animo* the gift or grant is made. It is the motive of the giver and not the knowledge of the acceptor that is to determine the validity of the transfer.[2] If any evidence of the grantee's participation in the fraudulent intent of the grantor were necessary, the mere acceptance of the transfer would be sufficient, for the law would presume such participation from this fact alone.[3] A donee, who sets up a voluntary conveyance when it would, if established, defeat creditors, participates in and carries out the intent of the donor.

THERE MUST BE A FRAUDULENT INTENT.—The word "voluntary" is not to be found in the statute, and it is

[1] Twyne's Case, 3 Co. 80; s. c. Moore, 638; Taylor v. Jones, 2 Atk. 600; Thomson v. Dougherty, 12 S. & R. 448.

[2] Partridge v. Gopp, 1 Eden, 163; s. c. 1 Ambl. 596; Thomson v. Dougherty, 12 S. & R. 448; Mohawk Bank v. Atwater, 2 Paige, 54; Van Wyck v. Seward, 18 Wend. 375; s. c. 6 Paige, 62; 1 Edw. 327; Swartz v. Hazlett, 8 Cal. 118; Trimble v. Ratcliffe, 9 B. Mon. 511; s. c. 12 B. Mon. 32; Wood v. Hunt, 38 Barb. 302; Holmes v. Clark, 48 Barb. 237; Bennett v. McGuire, 58 Barb. 625; s. c. 5 Lans. 183; Wise v. Moore, 31 Geo. 148; Newman v. Cordell, 43 Barb. 448; M'Meekin v. Edmonds, 1 Hill Ch. 288; Clark v. Chamberlain, 95 Mass. 257; Hicks v. Stone, 13 Minn. 434; Peck v. Carmichael, 9 Yerg. 325; Gamble v. Johnson, 9 Mo. 605; Laughton v. Harden, 68 Me. 208.

[3] Belt v. Raguet, 27 Tex. 471; King v. Russell, 40 Tex. 124.

perfectly clear from the preamble that its provisions were pointed not at voluntary conveyances as such, but against transfers concocted in fraud, and devised by a debtor for the purpose of delaying and defrauding his creditors.[1] It comprehends such conveyances as are made of malice, fraud, covin, collusion or guile, with intent or purpose to delay, hinder or defraud creditors. This intent or purpose constitutes the contaminating principle which will infect and vitiate the gift or conveyance, and is required to bring a case within the act. The inquiry in case of a voluntary conveyance must, therefore, be in regard to the intent of the donor. If there is no intent on his part to delay, hinder or defraud creditors, the conveyance is not within the statute; if, on the other hand, there is such an intent in the making of the transfer, then it is void as against creditors. In other words, it is the intent and purpose with which the grantor acts that characterizes the conveyance and renders it fraudulent under the statute. It is not conveyances, when a man owes, that are prohibited, but conveyances with the intent or purpose to delay, hinder or defraud creditors.[2] The statute itself does not say that mere indebtedness shall be conclusive evidence or even any evidence of the intent to defraud. The statute is simply silent, both as to the kind of facts which shall be admissible on this question, and as to the degree of weight to which any facts which may be admissible shall be entitled.[3]

[1] Jones v. Boulter, 1 Cox, 288; Worthington v. Shipley, 5 Gill, 449; Holloway v. Millard, 1 Madd. 414; Doe v. Routledge, Cowp. 705; Cadogan v. Kennett, Cowp. 432; Gale v. Williamson, 8 M. & W. 405; O'Connor v. Bernard, 2 Jones, 654; Hamilton v. Greenwood, 1 Bay, 173; Thomson v. Dougherty, 12 S. & R. 448; Clayton v. Brown, 17 Geo. 217.

[2] Lyne v. Bank of Kentucky, 5 J. J. Marsh. 545; Clayton v. Brown, 17 Geo. 217; Taylor v. Eubanks, 3 A. K. Marsh. 239; Mateer v. Hissim, 3 Penn. 160; Hunters v. Waite, 3 Gratt. 26; Weed v. Davis, 25 Geo. 684.

[3] Weed v. Davis, 25 Geo. 684.

Mode of Establishing Fraudulent Intent.—It is not necessary, however, to prove an actual intent to delay, hinder or defraud creditors.[1] Intent is an emotion or operation of the mind, and can usually be shown only by acts or declarations.[2] The motives which actuate men in the affairs of life can in general be ascertained only by an examination of their acts and all the concomitant circumstances, and a deduction of the motive from them in accordance with those principles which are shown by observation and experience to rule human conduct.[3] The intent to defraud need not, therefore, be made out by any direct proof of that particular fact. In this as well as in the other cases, where the intention with which an act is done is to be ascertained, it may be, and usually is, inferred or presumed from the knowledge of other facts. Men do not often declare their purpose when they are about to do an act injurious to others, and there is no means of arriving at a knowledge of the internal resolve or determination of the actor, but by reasoning or drawing inferences from his external conduct. To this kind of presumption resort is commonly had, not only in civil but in criminal cases. It is not a mere rule of law or of evidence in courts of justice, but all men are in the habit of acting upon this kind of presumption.[4]

Intent a Conclusion of Law.—Every man is held to know the law and the facts regarding his own affairs.[5]

[1] Carlisle v. Rich, 8 N. H. 44; Freeman v. Pope, 5 L. R. Ch. Ap. 538; s. c. L. R. 9 Eq. 206; Norton v. Norton, 59 Mass. 524; Potter v. McDowell, 31 Mo. 62; Jenkyn v. Vaughan, 3 Drew. 419; s. c. 25 L. J. Ch. 338; Smith v. Cherrill, 4 L. R. Eq. 390; s. c. 16 L. T. (N. S.) 517.

[2] Babcock v. Eckler, 24 N.Y. 623. [3] Filley v. Register, 4 Minn. 391.

[4] Van Wyck v. Seward, 18 Wend. 375; s. c. 6 Paige, 62; s. c. 1 Edw. 327.

[5] Swartz v. Hazlett, 8 Cal. 118; Christy v. Courtenay, 13 Beav. 96; Hunters v. Wait, 3 Gratt. 26.

The law also presumes that every man intends the necessary consequence of his act, and if the act necessarily delays, hinders, or defrauds his creditors, then the law presumes that it is done with a fraudulent intent.[1] The intent is to be assumed from the act.[2] The circumstances of the act, or rather the act itself, is conclusive evidence of fraud, for no man is permitted to say that he does not intend the necessary consequence of his own voluntary act.[3]

No Inquiry into Secret Motives.—The law will not speculate about what is actually passing in the donor's mind,[4] for the act need not be immoral or corrupt. The law does not concern itself about the private or secret motives which may influence the debtor. It does not deal with his conscience. He may make a conveyance with the most upright intentions, really believing that he has a right to do so, and that it is his right and duty to do it, and yet, if the transfer is voluntary, and hinders, delays or defrauds his creditors, it is fraudulent.[5] His actual mo-

[1] Potter v. McDowell, 31 Mo. 62; O'Connor v. Bernard, 2 Jones, 654; Freeman v. Pope, L. R. 5 Ch. Ap. 538; s. c. L. R. 9 Eq. 206; Norton v. Norton, 59 Mass. 524; Smith v. Cherrill, L. R. 4 Eq. 390; s. c. 16 L. T. (N. S.) 517; French v. French, 6 De G. M. & G. 95; s. c. 25 L. J. Ch. 612; Strong v. Strong, 18 Beav. 408; Freeman v. Burnham, 36 Conn. 469; Corlett v. Radcliffe, 14 Moore P. C. 121; Reese River Mining Co. v. Atwell, L. R. 7 Eq. 347; s. c. 20 L. T. (N. S.) 163; Van Wyck v. Seward, 18 Wend. 375; s. c. 6 Paige, 62; 1 Edw. 327; Thompson v. Webster, 7 Jur. (N. S.) 531; s. c. 9 W. R. 641; 4 Drew, 628; 4 De G. & J. 600; s. c. 4 L. T. (N. S.) 750; Mackay v. Douglass, L. R. 14 Eq. 106; s. c. 26 L. T. (N. S.) 71.

[2] Freeman v. Pope, L. R. 5 Ch. Ap. 538; s. c. L. R. 9 Eq. 206.

[3] Babcock v. Eckler, 24 N. Y. 623; First Nat'l Bank v. Bertschy, 52 Wis. 438.

[4] Freeman v. Pope, L. R. 5 Ch. Ap. 538; s. c. L. R. 9 Eq. 206.

[5] Potter v. McDowell, 31 Mo. 62; Patten v. Casey, 57 Mo. 118; Cole v. Tyler, 65 N. Y. 573.

tives may be considerations of generosity and kindness,[1] or an insufficient attention to the amount of his indebtedness or the extent of his assets,[2] or ignorance, or mistake, or misconception.[3] Apologies and excuses may be found to absolve him from moral turpitude, but to these the law cannot listen. It is vain to speculate upon his motives, or adduce evidence of a fair purpose. The presumption in such a case is conclusive, and against it all other evidence is unavailing.[4] The debtor may have some other purpose in view, but the intent to defraud is a part and parcel of his act.[5]

PRINCIPLES OF THE LAW RELATING TO VOLUNTARY CONVEYANCES.—It is upon these principles that the law relating to voluntary conveyances rests. In the construction of the statute they are deemed within its operation when they necessarily tend to defeat the just rights of creditors, even though they are made *bona fide* and with the intention of conferring a gratuitous benefit upon some meritorious object. The law stamps a man's generosity with the name of fraud when it prevents him from acting fairly towards his creditors, and presumes fraud if he disables himself from paying his debts. In such cases the presumption of fraud arises and may exist without the imputation of moral turpitude.[6] The principle is that persons must be just before they can be generous, and that debts must be paid before gifts can be made[7] This

[1] Freeman v. Pope, L. R. 5 Ch. Ap. 538; s. c. L. R. 9 Eq. 206; Reese River Mining Co. v. Atwell, L. R. 7 Eq. 347; s. c. 20 L. T. (N. S.) 163.

[2] Norton v. Norton, 59 Mass. 524; Black v. Sanders, 1 Jones (N. C.) 67; Van Wyck v. Seward, 18 Wend. 375; s. c. 6 Paige, 62; 1 Edw. 327.

[3] Hunters v. Waite, 3 Gratt. 26. [4] Hunters v. Waite, 3 Gratt. 26.

[5] Van Wyck v. Seward, 18 Wend. 375; s. c. 6 Paige, 62; 1 Edw. 327.

[6] O'Connor v. Bernard, 2 Jones, 654.

[7] Partridge v. Gopp, 1 Eden, 163; s. c. 1 Ambl. 596; Freeman v. Pope, L. R. 5 Ch. Ap. 538; s. c. L. R. 9 Eq. 206.

maxim finds as ready a response in the breast of the moralist as in that of the enlightened jurist, for it is based upon and has its sanction in the purest morality, the fountain of all law.[1]

THERE NEED BE NO SECRET TRUST.—It has been said that when a person who is in debt makes a gift the law intends a trust between them, as that the donee will in consideration of such voluntary conveyance relieve the donor and not see him suffer want,[2] and that this presumed trust affords the evidence of an intent to defraud.[3] It is well settled, however, that it is not necessary to establish any secret trust.[4] The conveyance will be invalid, although there is a real transfer between the parties, if the circumstances are such as to raise a conclusive presumption of an intent to defraud.

WHY VOLUNTARY CONVEYANCE IS FRAUDULENT.—A man is generally trusted, or obtains credit, in proportion to the property he appears to own. When creditors trust him, they look to his possessions as evidence of his ability to pay, and as a fund from which, if other resources of the debtor fail, they are to receive their demands. The very act of giving credit implies a confidence that he will not diminish this fund to their prejudice.[5] If he divests himself of his property by giving it away after he has obtained credit, and thereby renders himself unable to pay his debts, he violates the confidence which the creditors reposed in him.[6] This violation of confidence constitutes a

[1] Craig v. Gamble, 5 Fla. 430.

[2] Twyne's Case, 3 Co. 80; s. c. Moore, 638.

[3] Kipp v. Hanna, 2 Bland, 26.

[4] Partridge v. Gopp, 1 Eden, 163; s. c. Ambl. 596; Emery v. Vinall, 26 Me. 295.

[5] Eppes v. Randolph, 2 Call. 103.

[6] Brice v. Myers, 5 Ohio, 121.

fraud, for no man has such an absolute power over his own property as that he can alienate the same, when such alienation directly and necessarily tends to delay, hinder, or defraud his creditors, unless it is made on good consideration and *bona fide*.[1] It is true that they frequently look to the debtor's honesty, industry and skill in business,[2] but the law cannot take these into account, for they do not afford any means by which the payment of debts can be enforced.

VOLUNTARY CONVEYANCE IS A BADGE OF FRAUD.—A voluntary conveyance by a person who is indebted is a well-recognized badge of fraud,[3] for its natural and probable tendency is to delay, hinder and defraud creditors. The end in view must be to make the thing conveyed cease to be the property of him who conveys, and become the property of him to whom it is conveyed, and consequently to withdraw it from the creditors. There cannot be a conveyance, even one for value, into which this intent does not enter. Hence, the statute, after enacting that all conveyances made with the intent to delay, hinder or defraud creditors, shall be void, by the proviso excepts from the operation of that enactment conveyances made *bona fide* and upon good, that is, valuable consideration. In such case the price is substituted for the thing conveyed, and the intent to withdraw the particular property, although actually existing, is not *prima facie* injurious to creditors. But a voluntary conveyance

[1] Partridge v. Gopp, 1 Eden, 163; s. c. 1 Ambl. 596.

[2] Toulmin v. Buchanan, 1 Stew. 67.

[3] Goodson v. Jones, Styles, 445; Doe v. Routledge, Cowp. 705; Hoye v. Penn, 2 H. & J. 477; s. c. 1 Bland, 28; Jones v. Boulter, 1 Cox,. 288; Woodson v. Pool, 19 Mo. 340; Russell v. Hammond, 1 Atk. 14; George v. Milbanke, 9 Ves. 189.

must be founded upon a design to exempt the estate from the claims of creditors, for the act of making the conveyance can arise from no other intent, and inasmuch as no other fund replaces the property so intended to be exempted, that intent is injurious to the unsatisfied creditors, and may amount to fraud within the statute. To set up the transfer against creditors, if it is effectual, may hinder and defeat them. To make title under it and to set it up against all the world must be the very purpose of the transfer. If the title of the donee would defeat creditors, the intention of making the transfer must be to hinder, delay and defraud them.[1] A voluntary conveyance is therefore considered as *prima facie* evidence of an intent to delay, hinder or defraud creditors.[2]

Comparative Indebtedness.—The presumption of an intent to delay, hinder and defraud creditors arising from a voluntary conveyance by a person who is in debt is not conclusive, for such a conveyance is fraudulent only when it necessarily delays, hinders or defrauds them. Indebtedness, therefore, is only one circumstance from which an inference of an intent to defraud may be drawn,[3] and must

[1] O'Daniel v. Crawford, 4 Dev. 197; Smith v. Patton, 6 L. R. Ir. 32.

[2] Worthington v. Shipley, 5 Gill. 449; Holloway v. Millard, 1 Madd. 414; Gale v. Williamson, 8 M. & W. 405; Thompson v. Webster, 7 Jur. (N. S.) 531; s. c. 4 De G. & J. 600; s. c. 4 Drew, 628; s. c. 9 W. R. 641; s. c. 4 L. T. (N. S.) 50; Jackson v. Timmerman, 7 Wend. 436; Jackson v. Town, 4 Cow. 599; Thompson v. Hammond, 1 Edw. Ch. 497; Lerow v. Wilmarth, 91 Mass. 382; Bortrand v. Elder, 23 Ark. 494; Winchester v. Charter, 94 Mass. 606; s. c. 97 Mass. 140; s. c. 102 Mass. 272; Doyle v. Sleeper, 1 Dana, 531; Taylor v. Eubanks, 3 A. K. Marsh, 239; Wilson v. Buchanan, 7 Gratt. 334; Wilson v. Kohlhein, 46 Miss. 346; Steveus v. Robinson, 72 Me. 381; *vide* Hyde v. Chapman, 33 Wis. 391; Holden v. Burnham, 63 N. Y. 74; Pratt v. Curtis, 6 N. B. R. 139.

[3] Richardson v. Smallwood, Jac. 552; Cadogan v. Kennett, 2 Cowp. 432; Lyon v. Bank of Kentucky, 5 J. J. Marsh. 545; Skarf v. Soulby, 1 H. & Tw. 426; s. c. 1 Mc. & G. 364; 16 Sim. 344; 19 L. J. Ch. 30.

be considered in connection with the donor's estate.[1] The true rule by which the fraudulency or fairness of a voluntary conveyance is to be ascertained, in this respect, is founded on a comparative indebtedness, or in other words on the pecuniary ability of the donor at the time to withdraw the amount of the donation from his estate without the least hazard to his creditors, or in any material degree lessening their then prospects of payment.[2] In other words, the fraudulent intent is to be collected from the comparative value and magnitude of the gift.[3] It must be determined from all the circumstances in each particular case, whether there was an intent on the part of the donor in making the conveyance to delay, hinder or defraud his creditors.[4]

Burden of Proof.—The burden of proof rests upon the donee to establish the circumstances which will repel the presumption of a fraudulent intent. The conveyance stands condemned as fraudulent unless the facts which may give it validity are proved by him.[5] If no evidence

[1] Dietus v. Fuss, 8 Md. 148.

[2] Kipp v. Hanna, 2 Bland, 26; Bonny v. Griffith, Hayes, 115; Taylor v. Heriot, 4 Dessau. 227; Babcock v. Eckler, 24 N. Y. 623; Taylor v. Eubanks, 3 A. K. Marsh. 239; Carr v. Breese, 81 N. Y. 584.

[3] Partridge v. Gopp, 1 Eden, 163; s. c. Ambl. 596; Jacks v. Tunno, 3 Dessau. 1.

[4] Thompson v. Webster, 7 Jur. (N. S.) 531; s. c. 4 Drew. 628; s. c. 9 W. R. 641; s. c. 4 De G. & J. 600; s. c. 4 L. T. (N. S.) 750; Clements v. Eccles, 11 Ir. Eq. 229.

[5] Baxter v. Sewell, 3 Md. 334; s. c. 2 Md. Ch. 447; Spindler v. Atkinson, 3 Md. 409; s. c. 1 Md. Ch. 507; Ellinger v. Crowl, 17 Md. 361; Hunters v. Waite, 3 Gratt. 26; Crossley v. Ellworthy, L. R. 12 Eq. 158; Wilson v. Buchanan, 7 Gratt. 334; Woolston's Appeal, 51 Penn. 452; Crumbaugh v. Kugler, 2 Ohio St. 373; Reynolds v. Lansford, 16 Tex. 286; Raymond v. Cook, 31 Tex. 373; Oliver v. Moore, 23 Ohio St. 473; Spence v. Dunlap, 6 Lea. 457.

is given to show that the donor had ample means to meet his liabilities, then the transfer must be deemed void as against creditors.[1]

VOLUNTARY CONVEYANCE BY ONE FREE FROM DEBT.—By virtue of the absolute dominion which a man has over his own property, he may make any disposition of it which does not interfere with the existing rights of others, and such disposition, if it is fair and real, will be valid. To allow a man less than this would be to deny him the power of disposing of his own according to his good will and pleasure.[2] There is no more objection to a man's giving away his property, if he is able to do it, than there is to his selling it.[3] If a man is entirely free from debt, he may therefore make a voluntary conveyance in good faith.[4] He may, if he pleases, give away all his property, if he does it fairly and openly. The magnitude of the estate conveyed may awaken suspicion, and strengthen other circumstances if they exist, but taken alone it can not be considered as proof of fraud. A man who makes such a conveyance necessarily impairs his credit, and, if

[1] Ellinger v. Crowl, 17 Md. 361; Matthews v. Torinus, 22 Minn. 132.

[2] Sexton v. Wheaton, 8 Wheat. 229; Thomson v. Dougherty, 12 S. & R. 448. [3] Creed v. Lancaster Bank, 1 Ohio St. 1.

[4] Sexton v. Wheaton, 8 Wheat. 229; Goodson v. Jones, Styles, 445; Middlecome v. Marlow, 2 Atk. 519; Faringer v. Ramsay, 4 Md. Ch. 33; s. c. 2 Md. 365; Townsend v. Windham, 2 Ves. Sr. 1; Russell v. Hammond, 1 Atk. 14; Battersbee v. Farrington, 1 Swanst. 106; s. c. 1 Wils. 88; Bonny v. Griffith, 1 Hayes, 115; Benton v. Jones, 8 Conn. 186; Stevens v. Olive, 2 Brock. 90; Glaister v. Hewer, 8 Ves. 196; Sweeney v. Damron, 47 Ill. 450; Winebrenner v. Weisiger, 3 Mon. 32; Baker v. Welch, 4 Mo. 484; Charlton v. Gardner, 11 Leigh, 281; Haskell v. Bakewell, 10 B. Mon. 106; Sagitary v. Hide, 2 Vern. 44; Walker v. Burrows, 1 Atk. 93; Holmes v. Penney, 3 K. & J. 90; Roberts v. Gibson, 6 H. & J. 116; Phillips v. Wooster, 36 N. Y. 412; s. c. 3 Abb. Pr. (N. S.) 475; Mumma v. Weaver, 2 Pearson, 172.

openly done, warns those with whom he deals not to trust him too far.[1] If the debts are fully secured,[2] or are fully provided for in the conveyance,[3] the gift is in the same condition as if the donor were entirely free from debt.

MERE INDEBTEDNESS.—It is not any and every indebtedness that will amount to a prohibition of the debtor's power to make a gift. When there is no actual intent to defraud, there can be no inference of such an intent from the mere fact of a voluntary conveyance, unless the natural and inevitable consequence of the act is to delay, hinder, or defraud the creditors of the donor. The real and just construction of the statute does not, therefore, warrant the proposition that the existence of any debt at the time of the making of the gift would be such evidence of a fraudulent intention as to render a voluntary conveyance void, because there is scarcely any man who can avoid being indebted to some amount. He may intend to pay every debt as soon as it is contracted, and constantly use his best endeavors and have ample means to do so, and yet may be frequently, if not always, indebted in some small sum. There may be a withholding of claims contrary to his intention by which he is kept indebted in spite of himself.[4] To say that the mere circumstance of a

[1] Sexton v. Wheaton, 8 Wheat. 229; Martin v. Olliver, 9 Humph. 561; Kid v. Mitchell, 1 N. & M. 334; Stevens v. Olive, 2 Brock. 90; Dick v. Hamilton, 1 Deady, 322.

[2] Stephens v. Olive, 2 Brock. 90; Manders v. Manders, 4 Ir. Eq. 434; Pell v. Tredwell, 5 Wend. 661; Johnston v. Zane, 11 Gratt. 552; Hester v. Wilkinson, 6 Humph. 215; Williams v. Davis, 69 Penn. 21; Nippe's Appeal, 75 Penn. 472.

[3] George v. Millbank, 9 Ves. 189; Kid v. Mitchell, 1 N. & M. 334; Hester v. Wilkinson, 6 Humph. 215; Vance v. Smith, 2 Heisk. 343.

[4] Townsend v. Westacott, 2 Beav. 340; s. c. 9 L. J. Ch. 241; 4 Beav. 58.

person's being indebted at the time, without reference to the comparative state of his debts and of his means of paying them, is conclusive evidence of a fraudulent intention with respect to his creditors, would be asserting that which is contrary to every day's experience, and would be giving an operation to the statute not to be warranted upon the most liberal rules of construction in the suppression of fraud.[1] It is accordingly settled that mere indebtedness alone is not sufficient to render a voluntary conveyance void, if the donor has ample means left to pay his debts.[2]

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[1] Taylor v. Eubanks, A. K. Marsh. 239.

[2] Manders v. Manders, 4 Ir. Eq. 434; Skarf v. Soulby, 1 H. & Tw. 426; s. c. 1 Mc. & G. 364; s. c. 16 Sim. 344; s. c. 19 L. J. Ch. 30; Martyn v. McNamara, 4 Dr. & War. 411; Wilson v. Howser, 12 Penn. 109; Posten v. Posten, 4 Whart. 27; Izzard v. Izzard, 1 Bailey Ch. 228; Lyne v. Bank of Ky., 5 J. J. Marsh. 545; Dietus v. Fuss, 8 Md. 148; Lush v. Wilkinson, 5 Ves. 384; Burkey v. Self, 4 Sneed, 121; Dillard v. Dillard, 3 Humph. 41; Smith v. Littlejohn, 2 McCord, 362; Thacher v. Phinney, 89 Mass. 146; Brackett v. Wait, 4 Vt. 389; Arnett v. Wanett, 6 Ired. 41; Smith v. Reavis, 7 Ired. 341; Martin v. Evans, 2 Rich. Eq. 368; Dewey v. Long, 25 Vt. 564; Miller v. Pearce, 7 W. & S. 97; Mateer v. Hissim, 3 Penna. 160; Hudnal v. Wilder, 4 McCord, 294; s. c. 1 McCord, 227; Simpson v. Graves, 1 Riley Ch. 219, 232; Kipp v. Hanna, 2 Bland, 26; Kelly's Appeal, 77 Penn. 232; Teed v. Valentine, 65 N. Y. 471; Hamburger v. Peter, 8 Oregon, 181; Patrick v. Patrick, 77 Ill. 555; Chambers v. Sallie, 29 Ark. 407; Lincoln v. McLaighler, 74 Ill. 11; French v. Holmes, 67 Me. 186; Holmes v. Elliott, 65 Ind. 78; McFadden v. Mitchell, 54 Cal. 628; Koster v. Hiller, 4 Bradw. 21. *Contra*, Reade v. Livingston, 3 Johns. Ch. 481; Bayard v. Hoffman, 4 Johns. Ch. 450; McLemore v. Knuckolls, 37 Ala. 662; Miller v. Desha, 3 Bush, 212; Stiles v. Lightfoot, 26 Ala. 443; Spencer v. Godwin, 30 Ala. 355; Pinkston v. McLemore, 31 Ala. 308; Lowry v. Fisher, 2 Bush, 70; Davis v. McKinney, 5 Ala. 719; Miller v. Thompson, 3 Port. 196; Cato v. Easley, 2 Stew. 214; Gilmore v. N. A. Land Co., 1 Pet. C. C. 460; Cook v. Johnson, 12 N. J. Eq. 51; Moore v. Spence, 6 Ala. 506; Costillo v. Thompson, 9 Ala. 937; Lockyer v. De Hart, 6 N. J. 450; Houston v. Boyle, 10 Ired. 496; Enders v. Williams, 1 Met. (Ky.) 346; Hanson v. Buckner, 4 Dana, 251; Laurence v. Lippincott, 6 N. J. 473; Mitchell v. Berry, 1 Met. (Ky.) 602;

INSOLVENCY.—If the donor at the time is indebted to the extent of insolvency, the conveyance is void. A gift by a person unable to pay his debts, so directly and inevitably tends to delay and hinder creditors, and so plainly violates the moral duty of honesty, that the least regard to fair dealing and integrity renders it necessary to pronounce it void. Such a transaction is not to be looked on only as a means by which the intent to defraud may be inferred. The act is altogether incompatible and irreconcilable with a contrary intent. It is an act of fraud in itself. If the donor is insolvent, the only question is whether or not a conveyance is voluntary, and if it is

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Todd v. Hartley, 2 Met. (Ky.) 206; Bogard v. Gardley, 12 Miss. 302; Foote v. Cobb, 18 Ala. 585; High v. Nelms, 14 Ala. 350; Gannard v. Eslava, 20 Ala. 732; Swayze v. McCrossin, 21 Miss. 317; Spencer v. Godwin, 30 Ala. 355; Thomas v. De Graffinreid, 17 Ala. 602; Kahl v. Martin, 26 N. J. Eq. 60; Johnston v. Gill, 27 Gratt. 587; Lockhard v. Beckley, 10 W. Va. 87; *vide* Johnson v. West, 43 Ala. 689. In Russell v. Hammond, 1 Atk. 14, Lord Hardwicke said: "I have hardly known one case where the person conveying was indebted at the time of the conveyance that has not been deemed fraudulent"; and in Townsend v. Windham, 2 Ves. Sr. 1, he said: "I know of no case where a man indebted at the time makes a mere voluntary conveyance to a child without consideration and dies indebted, but that it shall be considered as part of his estate for the benefit of his creditors." These remarks have given rise to considerable controversy, but they may be explained by the fact that in his time the main controversy was whether voluntary conveyances were within the statute. By some the doctrine was called artificial. Jones v. Boulter, 1 Cox, 288. The main point was to establish the principle, and his language should be construed with a view to the facts of the case and the controversy of the times. It must be remembered that all the cases in which Lord Hardwicke holds this language are cases where there was no other property out of which the existing debts could be satisfied. These were all cases in equity where bills had been filed to have satisfaction out of the estate voluntarily settled. Howard v. Williams, 1 Bailey, 575; Kipp v. Hanna, 2 Bland. 26; Hopkirk v. Randolph, 2 Brock. 132.

voluntary, it is void as against creditors.[1] In such case the conveyance is void although the indebtedness is small and the property is of little value.[2]

[1] Morgan v. M'Lelland, 3 Dev. 82; Wellington v. Fuller, 38 Me. 61; Kimmell v. McRight, 2 Penn. 38; Stickney v. Borman, 2 Penn. 67; Shontz v. Brown, 27 Penn. 123; Carl v. Smith, 28 Leg. Int. 366; Burckmyers v. Mairs, Riley, 208; Dulany v. Green, 4 Harring. 285; Walcott v. Almy, 6 McLean, 23; Doughty v. King, 10 N. J. Eq. 396; Barnard v. Ford, L. R. 4 Ch. 247; Peat v. Powell, Ambl. 387; Sargent v. Chubbuck, 19 Iowa, 37; Harvey v. Steptoe, 17 Gratt. 289; Caswell v. Hill, 47 N. H. 407; Reppy v. Reppy, 46 Mo. 571; Gardner v. Baker, 25 Iowa, 343; Bennett v. McGuire, 58 Barb. 625; s. c. 5 Lans. 183; Raymond v. Cook, 31 Tex. 373; Worthington v. Shipley, 5 Gill, 449; Manhattan Co. v. Osgood, 15 Johns. 162; s. c. 3 Cow. 612; Buist v. Smyth, 2 Dessau. 214; Lyne v. Bank of Ky., 5 J. J. Marsh. 545; Beckham v. Secrest, 2 Rich. Eq. 54; Arnold v. Bell, 1 Hayw. 396; Caston v. Cunningham, 3 Strobh. 59; Godell v. Taylor, Wright, 82; Fones v. Rice, 9 Gratt. 568; Doughty v. King, 10 N. J. Eq. 396; Craig v. Gamble, 5 Fla. 430; Gray v. Tappan, Wright, 117; O'Brien v. Coulter, 2 Blackf. 421; Rundle v. Murgatroyd, 4 Dall. 304; Reynolds v. Lansford, 16 Tex. 286; Burpee v. Bunn, 22 Cal. 194; Catchins v. Manlove, 39 Miss. 655; Everett v. Read, 3 N. H. 55; Humbert v. Methodist Church, Wright, 213; Welcome v. Batchelder, 23 Me. 85; Carlisle v. Rich, 8 N. H. 44; Bridgford v. Riddell, 55 Ill. 261; Bennett v. McGuire, 58 Barb. 625; s. c. 5 Lans. 183; Myers v. King, 42 Md. 65; Moreland v. Atchison, 34 Tex. 351; Wright v. Campbell, 27 Ark. 637; San Francisco R. R. Co. v. Bee, 48 Cal. 398; Mitchell v. Byrns, 67 Ill. 522; Shorter v. Methoin, 52 Geo. 225; Russell v. Randolph, 26 Gratt. 705; Keating v. Keefer, 5 N. B. R. 133; s. c. 4 A. L. T. 162; Kehr v. Smith, 20 Wall. 31; s. c. 2 Dill. 50; s. c. 7 N. B. R. 97; s. c. 10 N. B. R. 49; Willis v. Gattman, 53 Miss. 721; Pashby v. Mandrigo, 42 Mich. 172; Matson v. Melchor, 42 Mich. 477; Donnebaum v. Tinsley, 54 Tex. 362; Spaulding v. Blythe, 73 Ind. 93; Dannan v. Coleman, 8 Mo. Ap. 594; Van Bibber v. Mathes, 52 Tex. 406; Gost v. Heidelberg, 2 Lea. 627; Cole v. Tyler, 65 N. Y. 73; Welcker v. Price, 2 Lea. 666; Primrose v. Browning, 59 Geo. 69; Stevers v. Horne, 62 Mo. 473; Chambers v. Sallie, 29 Ark. 407; McConnell v. Martin, 52 Ind. 454; Doak v. Rungan, 33 Mich. 75; Russell v. Thatcher, 2 Del. Ch. 320; Allen v. Walt, 9 Heisk. 242; McAnally v. O'Neal, 56 Ala. 299; Russell v. Fanning, 2 Bradw. 632; Fellows v. Smith, 40 Mich. 689; Nulton v. Isaacs, 30 Gratt. 726; Hunter v. Hunter, 10 W. Va. 321; *vide* Clements v. Eccles, 11 Ir. Eq. 229; Bond v. Swearingen, 1 Ohio, 182; Gale v. Williamson, 8 M. & W. 405.

[2] Taylor v. Coenen, L. R. 1 Ch. Div. 636; *vide* Hamburger v. Peter, 8 Oregon, 181.

GIFT THAT LEAVES DONOR INSOLVENT.—A conveyance which leaves the grantor insolvent stands on the same footing as a gift by a person who is insolvent at the time of making it.[1] If, for instance, a person having £10,000, and owing that amount, gives away £5000, it is clearly a fraud. If the effect is to withdraw any portion of the property so that there does not remain sufficient to enable creditors to pay themselves, the conveyance is clearly within the statute.[2] A transfer of all the donor's property is for this reason fraudulent.[3] A universal donee is bound to pay the debts of the donor existing at the time of the donation, or to abandon the property thus given to him.[4]

DEBTOR NEED NOT BE INSOLVENT.—It is not necessary, however, that insolvency should either be proved or presumed in order to render a voluntary conveyance void.[5] If the indebtedness is so large that the effect of the trans-

[1] Shears v. Rogers, 3 B. & A. 362; Smith v. Cherrill, L. R. 4 Eq. 390; 16 L. T. (N. S.) 517; Jackson v. Bouley, Car. & M. 97; Freeman v. Burnham, 36 Conn. 469; Coates v. Gerlach, 44 Penn. 43; Ammon's Appeal, 63 Penn. 284; Clayton v. Brown, 30 Geo. 490; Stewart v. Rogers, 25 Iowa, 395; Kaehler v. Diblee, 32 Wis. 19.

[2] French v. French, 6 De G. M. & G. 95; s. c. 25 L. J. Ch. 612; Taylor v. Heriot, 4 Dessau. 227; Chambers v. Spencer, 5 Watts, 404.

[3] Harlan v. Barnes, 5 Dana, 219.

[4] Porche v. Moore, 14 La. An. 241.

[5] Parrish v. Murphree, 13 How. 92; Thompson v. Webster, 7 Jur. (N. S.) 531; s. c. 4 Drew, 628; 9 W. R. 641; 4 De G. & J. 600; 4 L. T. (N. S.) 750; Jones v. Slubey, 5 H. & J. 372; Jacks v. Tunno, 3 Dessau. 1; Parkman v. Welch, 36 Mass. 231; Simpson v. Graves, 1 Riley Ch. 219, 232; Swartz v. Hazlett, 8 Cal. 118; Dennison v. Tatersall, 18 L. T. (N. S.) 303; Townsend v. Westacott, 2 Beav. 340; s. c. 9 L. J. Ch. 241; 4 Beav. 58; Potter v. McDowell, 31 Mo. 62; Richardson v. Smallwood, Jac. 552; Wilson v. Buchanan, 7 Gratt. 334; Worthington v. Bullitt, 6 Md. 172; s. c. 3 Md. Ch. 99; Blake v. Sawin, 92 Mass. 340; *vide* Lush v. Wilkinson, 5 Ves. 384; Norcutt v. Dodd, 1 Cr. & Ph. 100; Martyn v. M'Namara, 4 Dr. & War. 411.

fer is to defraud creditors, the conveyance is void.[1] If insolvency therefore takes place shortly after the making of the conveyance, that is enough.[2] Solvency is generally to be judged of by the event. If the debtor continues embarrassed, and becoming more and more involved, ends in total and acknowledged insolvency, this is sufficient evidence of his insolvency, as to the existing creditors whose debts remain unpaid.[3] The only exception to this rule is where a man is perfectly solvent at the time of the transfer, and is afterward rendered insolvent through some unexpected loss, or something which could not have been reasonably reckoned on at the time of the conveyance.[4] Insolvency at the time of the rendition of a judgment always raises a presumption of insolvency at the time of the gift.[5]

Proof of Solvency.—If the debts are ultimately paid,[6] or the donor accumulates other property sufficient to meet them when judgments are obtained upon them,[7] the conveyance will generally be valid. It is only when debts either prior or subsequent remain unpaid that any question can arise concerning its validity. The party

[1] Holmes v. Penney, 3 K. & J. 90; Patterson v. McKinney, 97 Ill. 41; Trust Co. v. Sedgwick, 97 U. S. 304; s. c. 18 N. B. R. 340.

[2] Crossley v. Elworthy, L. R. 12 Eq. 158; Townsend v. Westacott, 2 Beav. 340; s. c. 9 L. J. Ch. 241; 4 Beav. 58; Wilson v. Buchanan, 7 Gratt. 334; Pendleton v. Hughes, 65 Barb. 136.

[3] Izzard v. Izzard, 1 Bailey Ch. 228; Richardson v. Rhodus, 14 Rich. 95; Caston v. Cunningham, 3 Strobh. 59.

[4] Crossley v. Elworthy, L. R. 12 Eq. 158; Howard v. Williams, 1 Bailey, 575.

[5] Carlisle v. Rich, 8 N. H. 44; *vide* Eagan v. Downing, 55 Ind. 65.

[6] Davis v. Herrick, 37 Me. 397; Smith v. Reavis, 7 Ired. 341; Kerrigan v. Rautigan, 43 Conn. 17.

[7] Smith v. Reavis, 7 Ired. 341.

who sets up a voluntary conveyance in opposition to the claims of pre-existing creditors, is required to show that the means of the donor, independent of the property conveyed, were abundantly ample to satisfy all his creditors.[1] The inquiry is limited to the circumstances of the donor at the time of the conveyance.[2] The proof must show not merely a sufficiency of other property to pay the demand of the creditor who assails the transfer, but a sufficiency to pay all the debts then owing by the grantor.[3] Liabilities,[4] demands arising from a tort,[5] judgments rendered in another State,[6] and secured debts,[7] must be taken into consideration. Debts which are secured by the promise of a co-partner, who subsequently pays them,[8] and liabilities as an indorser when there is no proof that the persons for whom he was liable were unable to pay the respective sums for which he was responsible,[9] can not be taken into account. Notes and accounts belonging to the donor are to be estimated according to their value.[10] Land which may be exempted should be included in the estimate, unless there is evidence of an intention on the part of the donor to claim the exemption.[11] The price bid at a

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[1] Jones v. Taylor, 2 Atk. 600.

[2] King v. Thompson, 9 Pet. 204; Posten v. Posten, 4 Whart. 27.

[3] Birely v. Staley, 5 G. & J. 432.

[4] Hamet v. Dundass, 4 Penn. 175; Manhattan Co. v. Osgood, 15 Johns. 162; s. c. 3 Cow. 612; Trimble v. Ratcliff, 9 B. Mon. 511; s. c. 12 B. Mon. 32; Primrose v. Browning, 59 Geo. 69; *vide* Black v. Sanders, 1 Jones (N. C.) 67; Houston v. Boyle, 10 Ired. 496.

[5] Crossley v. Elworthy, L. R. 12 Eq. 158.

[6] Clark v. Depew, 25 Penn. 509.

[7] Powell v. Westmoreland, 60 Geo. 572.

[8] Hitt v. Ormsbee, 12 Ill. 166.

[9] King v. Thompson, 9 Pet. 204; *vide* Van Wyck v. Seward, 18 Wend. 375; s. c. 6 Paige, 62; s. c. 1 Edw. 327.

[10] Powell v. Westmoreland, 60 Geo. 572.

[11] Westmoreland v. Powell, 59 Geo. 256.

sheriff's sale a long time subsequent is not conclusive evidence of the value of the property.[1]

PROOF MUST BE CLEAR.—To rebut the presumption of fraud, the proof must be clear, full and satisfactory.[2] If there is a reasonable doubt of the adequacy of the grantor's means, then the voluntary conveyance must fall, for the effect of it is to delay and hinder his creditors.[3] It is incumbent on the donee to show a case not only without taint, but free from suspicion.[4] The condition of the donor must be shown to be such that a prudent man with an honest purpose and a due regard to the rights of his creditors could have made the gift.[5] This is to be ascertained not merely by taking an account of the grantor's debts and credits and striking a balance between them, but by an examination of the general state of his affairs.[6]

ORDINARY COURSE OF EVENTS.—If, in the ordinary course of events, the donor's property turns out to be inadequate to the discharge of his debts, the presumption of fraud remains, although the property reserved may have been deemed originally adequate to that purpose.[7]

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[1] Posten v. Posten, 4 Whart. 27; Jennings v. Prentice, 39 Mich. 421.

[2] Henderson v. Dodd, 1 Bailey Ch. 138; Miller v. Wilson, 15 Ohio, 108; Young v. White, 25 Miss. 146.

[3] Worthington v. Bullitt, 6 Md. 172; s. c. 3 Md. Ch. 99; Williams v. Banks, 11 Md. 198; s. c. 19 Md. 22; Seward v. Jackson, 8 Cow. 406; s. c. 5 Cow. 67; Henderson v. Dodd, 1 Bailey Ch. 138; Howard v. Williams, 1 Bailey, 575; Swartz v. Hazlett, 8 Cal. 118; Richardson v. Smallwood, Jac. 552; Patten v. Casey, 57 Mo. 118.

[4] Hopkirk v. Randolph, 2 Brock. 132.

[5] Parish v. Murphree, 13 How. 92.

[6] Shears v. Rogers, 3 B. & A. 362; Hunters v. Waite, 3 Gratt. 26. Blakeney v. Kirkeley, 2 Nev. & M. 544; Madden v. Day, 1 Bailey, 337, 587; Howard v. Williams, 1 Bailey, 575; McClenachan's Case, 2 Yeates, 502.

If he is unable to meet his debts in the ordinary course prescribed by law for their collection, or is reduced to that situation where an execution against him would be unavailing, the conveyance is void,[1] for a solvency which the law can not employ in the payment of the debts of an unwilling debtor is not distinguishable by any valuable difference from insolvency. The term solvency, in cases of this kind, implies as well the present ability of the debtor to pay out of his estate all his debts, as also such attitude of his property as that it may be reached and subjected by process of law to the payment of such debts.[2] The probable necessary and reasonable demands for the support of the donor and his family must therefore be taken into account and deducted.[3] The nature of his business, the society in which he lives, and his necessary expenses must be taken into consideration. The economy of country life does not furnish a measure or standard for city transactions, where fashion or luxury, or the necessities of an extensive business, require the command of abundant resources.[4]

Hazards of Business.—The question of solvency, moreover, depends not upon the nominal value of unsalable goods, but upon whether enough can be realized from the property to pay his liabilities.[5] Whether creditors can make their debts, if they try to enforce their collection by judicial process, is a surer test than the opinion of

[1] Potter v. McDowell, 31 Mo. 62; Dannan v. Coleman, 8 Mo. Ap. 594.

[2] Eddy v. Baldwin, 32 Mo. 369.

[3] Meyer v. Mohr, 19 Abb. Pr. 299; Emerson v. Bemis, 69 Ill. 537.

[4] Sedgwick v. Place, 10 N. B. R. 28; s. c. 5 N. B. R. 168; s. c. 5 Ben. 184.

[5] Parrish v. Murphree, 13 How. 92; Paulk v. Cooke, 39 Conn. 566.

indifferent persons.[1] Although the property reserved is equal in nominal value to the donor's existing indebtedness, that does not constitute such sufficient security for his debts as his creditors are entitled to require. They have the right to expect satisfaction of their debts out of his property, and he has no right, in law or morals, to throw upon them the loss which must necessarily occur in converting it into money.[2] A scanty provision for the payment of debts will not, for this reason, render the conveyance valid.[3] Property worth $7250 has been deemed insufficient to meet debts amounting to $6848,[4] and property worth $48,000 has been held not to be ample to meet debts to the amount of $42,000.[5] The mere production of deeds of conveyance, unaccompanied by any proof of the existence of the property conveyed, and the title of the grantor thereto, or his possession thereof, or the possession thereof by the grantee, is wholly insufficient to establish the solvency of the donor.[6]

PROPERTY MUST BE ACCESSIBLE.—Whether the property reserved is what will be deemed ample does not depend entirely on the amount and value, as the real end to be accomplished is that the conveyance shall not

[1] Kehr v. Smith, 20 Wall. 31; s. c. 7 N. B. R. 97; s. c. 10 N. B. R. 49; s. c. 2 Dill. 50; *vide* Hardy v. Mitchell, 67 Ind. 485.

[2] Churchill v. Wells, 7 Cold. 364; Parrish v. Murphree, 13 How. 92; Paulk v. Cooke, 39 Conn. 566.

[3] Salmon v. Bennett, 1 Conn. 525; Paulk v. Cooke, 39 Conn. 566; Kehr v. Smith, 20 Wall 31; s. c. 2 Dill. 50; s. c. 7 N. B. R. 97; s. c. 10 N. B. R. 49; Beecher v. Clark, 10 N. B. R. 385; s. c. 12 Blatch. 256; Phipps v. Sedgwick, 95 U. S. 3; s. c. 12 Blatch. 163; s. c. 5 Ben. 184; s. c. 5 N. B. R. 168; s. c. 10 N. B. R. 28.

[4] Black v. Sanders, 1 Jones (N. C.) 67.

[5] Crumbaugh v. Kugler, 2 Ohio St. 373; Miller v. Wilson, 15 Ohio, 108.

[6] Birely v. Staley, 5 G. & J. 432.

deprive creditors of the means of collecting their debts. Hence, the nature and situation of the property is to be regarded as well as the amount and value, in view of the facilities that the creditors may have for the collection of their debts.[1] The property must be so circumstanced that neither delay nor difficulty, nor expense, need be encountered before it can be made available to creditors. The donor must not only have ample means remaining to discharge all his obligations, but these means must be readily and conveniently accessible to his creditors.[2] If the remaining property is heavily incumbered,[3] or consists of a reversion after the life-estate of an infant,[4] or of the life-estate of a person advanced in years,[5] or in feeble health,[6] or of property that can not be taken on execution,[7] or of property which is in its nature very unstable and can not be easily traced,[8] or of depreciating commercial paper,[9] or of the remnants of a stock of merchandise which diminishes each day in value,[10] it is not sufficient. The property must also be in the State where the donor resides. If it is in some other country where creditors can not reach it, the gift may be set aside.[11]

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[1] Church v. Chapin, 35 Vt. 223.

[2] Worthington v. Bullitt, 6 Md. 172; s. c. 3 Md. Ch. 99; Mohawk Bank v. Atwater, 2 Paige, 54; Levering v. Norvell, 9 Baxter, 176.

[3] Worthington v. Bullitt, 6 Md. 172; s. c. 3 Md. Ch. 99; Hunters v. Waite, 3 Gratt. 26; Wooten v. Osborn, 77 Ind. 513.

[4] Edmunds v. Mister, 58 Miss. 765.

[5] Williams v. Banks, 11 Md. 198; s. c. 19 Md. 22.

[6] Strong v. Strong, 18 Beav. 408.

[7] Van Wyck v. Seward, 18 Wend. 375; s. c. 6 Paige, 62; s. c. 1 Edw. 327; Henderson v. Lloyd, 3 F. & F. 7; Hunters v. Waite, 3 Gratt. 26; Church v. Chapin, 35 Vt. 223. [8] Blakeney v. Kirkeley, 2 Nev. & M. 544.

[9] McClenachan's Case, 2 Yeates, 502.

[10] Paulk v. Cooke, 39 Conn. 566.

[11] Heath v. Page, 63 Penn. 280; Thompson v. Webster, 7 Jur. (N. S.) 531; s. c. 9 W. R. 641; s. c. 4 De G. & J. 600; s. c. 4 Drew, 628; s. c.

DIFFERENCE BETWEEN THAT GIVEN AND THAT RESERVED. If a party possessed of real estate and also of other assets consisting of *choses in action* gives away the former, and leaves his creditors to resort to the latter, where their remedy may be precarious and difficult, and the property at all events less readily and conveniently accessible, the conveyance of necessity operates to hinder and delay creditors in the collection of their debts.[1] When the donor's assets, however, consist only of debts and book accounts, and he takes a small sum to buy land, which he causes to be conveyed as a gift to another, the *bona fides* of the transaction and the sufficiency of his remaining assets to satisfy existing creditors must be judged by the character and nature of the property which he had at the time of making the gift.[2] When the property is not conveniently accessible to creditors, the conveyance is liable to be set aside, although the donor at the time of the gift is not only not insolvent, but may have enough property left, in some form or another, to satisfy all his debts.[3] If he fraudulently conceals his property to avoid the payment of his debts he is deemed to be insolvent, although his property consists of money in his pocket and is sufficient to pay all his debts.[4]

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4 L. T. (N. S.) 750; French v. French, 6 De G. M. & G. 95; s. c. 25 L. J. Ch. 612; Church v. Chapin, 35 Vt. 223; Baker v. Lyman, 53 Geo. 339; Elwell v. Walker, 52 Iowa, 158.

[1] Worthington v. Bullitt, 6 Md. 172; s. c. 3 Md. Ch. 99; Warner v. Dove, 33 Md. 579; Blake v. Sawin, 92 Mass. 340; Carpenter v. Carpenter, 25 N. J. Eq. 194; Cocke v. Oakley, 50 Miss. 628.

[2] Warner v. Dove, 33 Md. 579.

[3] Thompson v. Webster, 7 Jur. (N. S.) 531; s. c. 9 W. R. 641; s. c. 1 De G. & J. 600; s. c. 4 Drew, 628; s. c. 4 L. T. (N. S.) 750; French v. French, 6 De G. M. & G. 95; s. c. 25 L. J. Ch. 612.

[4] Blake v. Sawin, 92 Mass. 340.

SOLVENCY DETERMINED BY RESULT.—The voluntary conveyance must be such as a prudent and just man would make with a proper regard to his condition and circumstances, and a due consideration of all future events which prudence and integrity can foresee.[1] Existing creditors have no ground for complaint if they stand by and suffer subsequent creditors to sweep away the reserved property by obtaining judgments and executions before them,[2] and on the other hand the donor's solvency must not depend upon success in the business in which he is engaged,[3] or the skillful management of his affairs.[4] The risk and hazard of his speculations or of his financial arrangements can not either legally or honestly be thrown upon his creditors.

ACCIDENTS.—The law, however, provides against fraud and the intention to defraud, and not accidents or calamities. The gift, therefore, will be valid although the property may ultimately turn out to be inadequate, if this is occasioned by some accident which human foresight could not guard against,[5] as by losses in trade,[6] or by fire,[7] or by storms.[8] The ordinary fluctuations in

[1] Swartz v. Hazlitt, 8 Cal. 118; Lloyd v. Fulton, 91 U. S. 480.

[2] Eigleberger v. Kibler, 1 Hill Ch. 113; Howard v. Williams, 1 Bailey, 575; Richardson v. Rhodus, 14 Rich. 95; Alston v. Rowles, 13 Fla. 117; Ricketts v. McCully, 7 Tenn. 712.

[3] Carpenter v. Roe, 10 N. Y. 227; Crossley v. Ellworthy, L. R. 12 Eq. 158; Lloyd v. Fulton, 91 U. S. 480.

[4] Bertrand v. Elder, 23 Ark. 494; Young v. White, 25 Miss. 146.

[5] Jacks v. Tunno, 3 Dessau. 1; Brackett v. Wait, 4 Vt. 389; Chambers v. Spencer, 5 Watts, 404; Mateer v. Hissim, 3 Penna. 160; Smith v. Yell, 8 Ark. 470; Pepper v. Carter, 11 Mo. 540; Howard v. Williams, 1 Bailey, 575; Alston v. Rowles, 13 Fla. 117; Buchanan v. McMinch, 3 Rich. (N. S.) 498; *vide* O'Daniel v. Crawford, 4 Dev. 197.

[6] Howard v. Williams, 1 Bailey, 575; Sherman v. Hogland, 54 Ind. 578; Baugh v. Boles, 35 Ind. 524.

[7] Pepper v. Carter, 11 Mo. 540.

[8] Brackett v. Wait, 4 Vt. 389; *vide* Chamberlayne v. Temple, 2 Rand. 384.

the value of property, however, occasioned by the condition of mercantile affairs, can not be ranked among casualties. These fluctuations are constantly taking place, and men must calculate upon and be prepared for them.[1] The same principle applies to losses that occur from the wastefulness and improvidence of the donor. These are matters that prudence and sagacity can foresee, and the risk can not therefore be thrown upon the creditors.[2]

When Voluntary Conveyance is Valid.—If the debtor after making the conveyance has ample means left to discharge all his pecuniary obligations, the conveyance is valid.[3] If his circumstances are such that he may law-

[1] Izzard v. Izzard, 1 Bailey Ch. 228; Wilson v. Buchanan, 7 Gratt. 334; Elwell v. Walker, 52 Iowa, 158. In Clements v. Eccles, 11 Ir. Eq. 229, a case was put by way of illustration of a loss of the reserved property by defect of title, and it was intimated that such loss would fall on the creditors, but on principle this can not be so. The donor ought to be held to know the character of his title to his land.

[2] Hunters v. Waite, 3 Gratt. 26; Spirett v. Willows, 3 De J. G. & S. 293; s. c. 34 L. J. Ch. 365; s. c. 11 Jur. (N. S.) 70; L. R. 1 Ch. 520; 14 L. J. (N. S.) 72; Kent v. Riley, L. R. 14 Eq. 191. The case of Spirett v. Willows has been treated as one of actual fraud (*vide* Freeman v. Pope, L. R. 5 Ch. 538; L. R. 9 Eq. 206), but the reported facts of the case do not sustain the statement, nor did the court so consider it. Moreover, it can well stand as a case of constructive fraud. The indebtedness was £370. The amount reserved was £720. The donor's discharge in bankruptcy was suspended for three years on account of *unjustifiable extravagance*. It was a case of sheer improvidence, and not distinguishable in principle from Hunters v. Waite, and there is not a single case in all the reports that would support a voluntary conveyance under such circumstances.

[3] Hinde's Lessee v. Longworth, 11 Wheat. 199; Salmon v. Bennett, 1 Conn. 525; Jacks v. Tunno, 3 Dessau. 1; Bennett v. Bedford Bank, 11 Mass. 421; Parker v. Proctor, 9 Mass. 390; Hamilton v. Greenwood, 1 Bay. 173; Seward v. Jackson, 8 Cow. 406; s. c. 5 Cow. 67; Teasdale v. Reaborne, 2 Bay. 546; Taylor v. Heriot, 4 Dessau. 227; Taylor v. Eubanks, 3 A. K. Marsh. 239; Hudnal v. Wilder, 4 McCord, 294; s. c. 1 McCord, 227; Jackson v. Post, 15 Wend. 588; Jackson v. Town, 4 Cow.

fully make a gift, he may give his property to a stranger,[1]

599; Planck v. Schermerhorn, 3 Barb. Ch. 644; Babcock v. Eckler, 24 N. Y. 623; Holmes v. Clark, 48 Barb. 237; Fulton v. Fulton, 48 Barb. 581; Mayberry v. Neely, 5 Humph. 337; Norton v. Norton, 59 Mass. 524; Clayton v. Brown, 17 Geo. 217; Bird v. Boldue, 1 Mo. 701; Cutter v. Griswold, Walk. Ch. 437; Brackett v. Wait, 4 Vt. 389; Chambers v. Spencer, 5 Watts, 404; Brice v. Myers, 5 Ohio, 121; Hunters v. Waite, 3 Gratt. 26; Filley v. Register, 4 Minn. 391; Pomeroy v. Bailey, 43 N. H. 118; Bay v. Cook, 31 Ill. 336; Arnett v. Wanett, 6 Ired. 41; Jones v. Young, 1 Dev. & Bat. 352; Dodd v. McCraw, 8 Ark. 83; Hall v. Edrington, 8 B. Mon. 47; Lane v. Kingsberry, 11 Mo. 402; Trimble v. Ratcliff, 9 B. Mon. 511; s. c. 12 B. Mon. 32; Young v. White, 25 Miss. 146; Swartz v. Hazlett, 8 Cal. 118; Weed v. Davis, 25 Geo. 684; Parrish v. Murphree, 13 How. 92; Wilson v. Buchanan, 7 Gratt. 334; Picquet v. Swan, 4 Mason, 443; Grimes v. Russell, 45 Mo. 431; Gridley v. Watson, 53 Ill. 186; Pike v. Miles, 23 Wis. 164; Place v. Rhem, 7 Bush. 585; Frank v. Kessler, 30 Ind. 8; Worthington v. Shipley, 5 Gill. 449; Brown v. Austen, 35 Barb. 341; s. c. 22 How. Pr. 394; Peck v. Brummagim, 31 Cal. 440; Leavitt v. Leavitt, 47 N. H. 329; Duhme v. Young, 3 Bush, 343; King v. Thompson, 9 Pet. 204; Dick v. Hamilton, 1 Deady, 322; Wilder v. Brooks, 10 Minn. 50; Hinman v. Parkis, 33 Conn. 188; Greenfield's Estate, 14 Penn. 489; Woolson's Appeal, 51 Penn. 452; Townsend v. Maynard, 45 Penn. 198; Moritz v. Hoffman, 35 Ill. 553; Carson v. Foley, 1 Iowa, 524; Whittier v. Prescott, 48 Me. 367; Hopkirk v. Randolph, 2 Brock. 132; Howard v. Williams, 1 Bailey, 575; Skarf v. Soulby, 1 H. & Tw. 426; s. c. 1 Mc. & G. 364; s. c. 16 Sim. 344; s. c. 19 L. J. Ch. 30; Bucklin v. Bucklin, 1 Keyes, 141; Borst v. Spelman, 4 N. Y. 284; Ellinger v. Crowl, 17 Md. 361; Sheppard v. Pratt, 32 Iowa, 296; Wilson v. Kohlheim, 46 Miss. 346; Brown v. Spivey, 53 Geo. 155; Bridgford v. Riddell, 55 Ill. 261; Kerr v. Hutchins, 36 Tex. 452; Brookbank v. Kennard, 41 Ind. 339; Kelly v. Campbell, 38 N. Y. (Keyes) 29; Baldwin v. Ryan, 3 T. & C. 251; Ricketts v. McCully, 7 Tenn. 712; Childs v. Connor, 38 N. Y. Supr. 471; Guyer v. Figgins, 37 Iowa, 317; Dunlap v. Hawkins, 59 N. Y. 342; Smith v. Vodges, 92 U. S. 183; 13 N. B. R. 433; Elfelt v. Hinch, 5 Oregon, 255; White v. Beltis, 9 Heisk. 645; Haston v. Castner, 29 N. J. Eq. 536; Lloyd v. Fulton, 91 U. S. 480; Matthews v. Jordan, 88 Ill. 602; Herring v. Richards, 3 Fed. Rep. 439; s. c. 1 McCrary, 570; Jones v. Clifton, 101 U. S. 225; Elwell v. Walker, 52 Iowa, 158; *In re* Henry Trough, 8 Phila. 214; Merrell v. Johnson, 96 Ill. 224; Wiswell v. Jarvis, 9 Fed. Rep. 84; Reich v. Reich, 26 Minn. 97; Camp v. Thompson, 25 Minn. 175; Martin v. Lincoln, 4 Lea, 334; White v. Witt, 24 W. R. 727; Providence Savings Bank v. Huntington, 10 Fed. Rep. 871.

[1] Holloway v. Millard, 1 Madd. 414; Speise v. M'Coy, 6 W. & S. 485.

as well as to those to whom he is bound by ties of kinship or natural affection; and on the other hand, the mere fact that the donor is under a moral obligation to the donee, such as what is called the debt of nature from a parent to his child, will not render the conveyance valid, for his obligations to his creditors are paramount. When a man's circumstances, however, are such as to enable him to discharge both, it is his duty to do so.[1] A man of wealth feels himself bound to advance his children, when they leave him to act for themselves and to perform their own parts on the great theatre of the world. His own feelings and public opinion would equally reproach him should he withhold from them those aids which his circumstances and their education and station in life may seem to require. A reasonable advancement under such circumstances would obviously be a provision required by justice and the common sense of mankind.[2] A person engaged in hazardous pursuits often regards it also as a sacred duty to his wife and children to set apart, by conveyance for their use, a certain and reasonable portion of his estate when he is free from the shackles of debt, and thereby keep them somewhat secure from the ills of poverty to which those engaged in the traffic of buying and selling are peculiarly liable.[3] The statute was not intended to interfere with such transfers or to disturb the ordinary and safe transactions in society made in good faith, and which at the time subjected creditors to no hazard. No fraudulent intent, no intent to delay, or in any manner to injure creditors, can be inferred from such conveyances. The consequence can not be apprehended from the acts, and therefore the

[1] Brice v. Myers, 5 Ohio, 121.

[2] Hopkirk v. Randolph, 2 Brock. 132.

[3] Haskell v. Bakewell, 10 B. Mon. 106; Bridgford v. Riddell, 55 Ill. 261; Barnum v. Farthing, 40 How. Pr. 25.

acts can not be considered as constructively fraudulent. They must be regarded as fair dispositions of property, a fair exercise of the power of ownership, and not within the statute.

VALUE OF THE PROPERTY.—If the property is of almost infinitesimal value and will not sell for enough to pay the costs on an execution, the conveyance is valid.[1] A gift of such inconsiderable value as to come under the denomination of a present, made under circumstances entirely free from suspicion, has never been hunted up by a creditor and claimed as a part of the donor's estate. A riding horse, wedding clothes, jewels, an instrument of music, or any other gift which is usual in the particular locality, comes strictly, when made by a man of unquestionable solidity, within that class of donations which are denominated presents.[2]

PARTIALLY VOLUNTARY.—It is manifest that conveyances may be partially as well as entirely voluntary. When there is no actual intent to defraud, a valuable consideration, though inadequate, will sustain the transfer in a court of law.[3] The rule in equity, however, is different. A court of equity can do full justice to all parties by allowing the deed to stand as security for the consideration actually paid, and appropriating the balance to the payment of the vendor's debts. If there is any difference between the price paid and the actual value of the property, courts of equity will therefore regard the conveyance to the extent of the difference as voluntary.[4] As

[1] French v. Holmes, 67 Me. 186.

[2] Hopkirk v. Randolph, 2 Brock. 132.

[3] Jackson v. Peek, 4 Wend. 300.

[4] Worthington v. Bullitt, 6 Md. 172; s. c. 3 Md. Ch. 99; Matthews v. Feaver, 1 Cox, 278; Wright v. Stannard, 2 Brock. 311; Corlett v. Rad-

between the vendor and the vendee the courts will not weigh the consideration in golden scales, but the rule is different where creditors are concerned.[1] It is difficult to say what will amount to an inadequate consideration, and no general rule has been or can be laid down. Each case must depend upon its own circumstances. The consideration, however, must be palpably less than the real value of the property, or what it would bring at public sale in the market,[2] or what it might reasonably be supposed that the vendor would have taken from any other person.[3]

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cliffe, 14 Moore P. C. 121; Van Wyck v. Seward, 18 Wend. 375; s. c. 6 Paige, 62; 1 Edw. 327; Robinson v. Stewart, 10 N. Y. 189; M'Meekin v. Edmonds, 1 Hill Ch. 288; Norton v. Norton, 59 Mass. 524; Trimble v. Ratcliffe, 9 B. Mon. 511; s. c. 12 B. Mon. 32; Crumbaugh v. Kugler, 2 Ohio St. 373; Herschfeldt v. George, 6 Mich. 456; Church v. Chapin, 35 Vt. 223; Hopkirk v. Randolph, 2 Brock. 132; Abbee v. Newton, 19 Conn. 20; Allen v. Russell, 78 Ky. 105; *vide* Union Bank v. Toomer, 2 Hill Ch. 27; Turnley v. Hooper, 2 Jur. (N. S.) 108.

[1] Matthews v. Feaver, 1 Cox, 278; *vide* Nunn v. Wilsmore, 8 T. R. 521; Grogan v. Cooke, 2 Ball & B. 233; Middlecome v. Marlow, 2 Atk. 519; Penhall v. Elwin, 1 Sm. & Gif. 258; Thompson v. Webster, 7 Jur. (N. S.) 531; s. c. 9 W. R. 641; 4 De G. & J. 600; 4 Drew, 628; 4 L. T. (N. S.) 750; Blount v. Doughty, 3 Atk. 481; Taylor v. Heriot, 4 Dessau. 227; Copis v. Middleton, 2 Madd. 410; Wright v. Stannard, 2 Brock. 311.

[2] Worthington v. Bullitt, 6 Md. 172; s. c. 3 Md. Ch. 99.

[3] Black v. Cadwell, 4 Jones (N. C.) 150; Arnold v. Bell, 1 Hayw. 396; McLean v. Weeks, 65 Me. 411.

CHAPTER XII.

NUPTIAL SETTLEMENTS.

ANTE-NUPTIAL SETTLEMENT.—In the absence of all fraud, a party, before marriage, has the right to insist on such terms as may be deemed proper, as a consideration and inducement for the marriage,[1] and a contract so made is in contemplation of law founded upon a valuable consideration. The indissoluble nature of the marriage contract, the alteration which it effects in the personal condition of the parties, and the nature of the rights, duties and disabilities which arise from it, render the consideration of marriage important and valuable, and constitute the parties purchasers for a valuable consideration.[2] Consequently if a settlement is made in good faith, and without notice of fraud to the parties who take under it, it is unimpeachable by creditors.[3] Both parties must concur in or have cognizance of any intended fraud, in order to render it void. If the settler alone intends a

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[1] Hardy v. Green, 12 Beav. 182.

[2] Magniac v. Thompson, 7 Pet. 348; s. c. 1 Bald. 344; Frazer v. Thompson, 1 Giff. 49; s. c. 4 De G. & J. 659.

[3] Magniac v. Thompson, 7 Pet. 348; s. c. 1 Bald. 344; Partridge v. Gopp, 1 Eden, 163; s. c. Ambl. 596; Campion v. Cotton, 17 Ves. 264; Cadogan v. Kennett, 2 Cowp. 432; *ex parte* McBurnie, 1 De G. M. & G. 441; Andrews v. Jones, 10 Ala. 400; Eppes v. Randolph, 2 Cal. 103; Coutts v. Greenhow, 2 Munf. 363; s. c. 4 H. & M. 485; Hazelinton v. Gill, 3 T. R. 620, note; s. c. 3 Doug. 415; Bunnel v. Witherow, 29 Ind. 123; Tunno v. Trezevant, 2 Dessau. 264; Frank's Appeal, 59 Penn. 190; Jones' Appeal, 62 Penn. 324; Croft v. Arthur, 3 Dessau. 223; Bank v. Marchand, T. U. P. Charlt. 247; Herring v. Wickham, 29 Gratt. 628.

fraud, and the other party has no notice of it, the settlement will be valid.

SPECIFIC MARRIAGE.—The contract, however, must be made with reference to a specific marriage, and not a mere future possible state or condition of matrimony; as where a father promises a daughter that if, at any after period of life, she shall choose to enter into wedlock, he will in that event, and upon its occurrence, give, convey or pay to her specified money or property. In such a case there is no mutuality, either of promise or consideration. The agreement of the father is founded upon no undertaking or promise of the daughter, and upon no valuable consideration, but is merely for a future contingent advancement of the daughter. It is not, in the eye of the law, in consideration of marriage.[1] If, however, there is a specific marriage in contemplation, a mere legal contract, and promise made in good faith, to marry another is a valuable consideration. In reference to the question of the sufficiency and value of the consideration, and consequently of the validity of the title, there is no real and substantial difference between a marriage formally solemnized and a binding and obligatory agreement which has been fairly and truly, and above all suspicion of collusion, made to form such connection and enter into that relation.[2]

CONTEMPORANEOUS GIFT.—A reasonable gift, made contemporaneously with a marriage, and accompanied with a delivery of possession, has strong claims to be considered as a gift in consideration of the marriage, for it is not usual to convey property by deed which passes by delivery, nor to use the solemnity of delivery expressly in consideration

[1] Welles v. Cole, 6 Gratt. 645. [2] Smith v. Allen, 87 Mass. 454.

of marriage, although that may be the real consideration.[1] The gift, however, must be contemporaneous with the marriage.[2] A deed made prior to the marriage can not be connected with the marriage articles, when there is no reference in the deed to them.[3]

STATEMENTS IN ARTICLES.—It is not necessary that the marriage articles should contain an enumeration of the property which is subject to the settlement.[4] Chattels, stocks, books, plate, jewelry, and merchandise may be settled as well as land.[5] It is deemed contrary to the reason and policy of the law for a man on his marriage to stipulate that all the property which he may acquire during coverture, even to the smallest particular, shall be subject to the settlement, and such a stipulation will not be enforced until the creditors are satisfied.[6] A stipulation that the husband and wife shall take the profits jointly will not render the property liable to his creditors.[7]

TO WHOM EXTENDS.—The consideration of marriage extends to the wife's children by a former marriage,[8] the husband's children by a former marriage,[9] and children

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[1] Hopkirk v. Randolph, 2 Brock. 132; Toulmin v. Buchanan, 1 Stew. 67; Andrews v. Jones, 10 Ala. 400.

[2] Hayes v. Jones, 2 Pat. & H. 583; *vide* Toulmin v. Buchanan, 1 Stew. 67.

[3] Croft v. Arthur, 3 Dessau. 223.

[4] Jarman v. Woolloton, 3 T. R. 618; Arundell v. Phipps, 10 Ves. 139.

[5] Campion v. Cotton, 17 Ves. 264; Cadogan v. Kennett, 2 Cowp. 432; Bank v. Marchand, T. U. P. Charlt. 247.

[6] *Ex parte* Bollard, L. R. 17 Eq. 115; Hardy v. Green, 12 Beav. 182.

[7] Scott v. Gibbon, 5 Munf. 86.

[8] Newstead v. Searles, 1 Atk. 265; Ithel v. Beane, 1 Ves. Sr. 215; Ball v. Burnford, Prec. Ch. 113.

[9] Doe v. Routledge, 2 Cowp. 705; *vide* Bank v. Marchand, T. U. P. Charlt. 247.

of the parties born before the marriage.[1] When the articles go beyond the immediate objects of the marriage and provide for collateral relatives, the settlement as to them, not being supported by the marriage, is purely voluntary.[2] The consideration of marriage runs through the whole settlement and supports all its provisions, those which relate to the husband as well as those which relate to the wife. If, therefore, the settlement is valid when it is made, no event afterwards can alter it. If a settlement is made by a father upon the marriage of his son, on the husband and wife for their lives, and afterwards upon the children, and the wife dies without any issue, the settlement will be valid against the father's creditors. The law is the same in the case of a stranger.[3]

SETTLEMENT BY HUSBAND.—A man who is indebted may, on his marriage, make a settlement of his property, provided the settlement is made honestly and in good faith,[4] and the wife's knowledge of his indebtedness will not alone render it void.[5] Such a settlement will be valid although the parties have lived in illicit intercourse for a long time previous to the marriage.[6] It is, however, clearly established that marriage can not be made the means of committing fraud. If there is an intent to delay or hinder or defraud creditors, and to make the celebration

[1] Coutts v. Greenhow, 2 Munf. 363; s. c. 4 H. & M. 485.

[2] Smith v. Cherrill, L. R. 4 Eq. 390; s. c. 16 L. T. (N. S.) 517.

[3] Nairn v. Prowse, 6 Ves. 752.

[4] Bulmer v. Hunter, L. R. 8 Eq. 46; s. c. 38 L. J. Ch. 543; s. c. 20 L. T. (N. S.) 492; *ex parte* McBurnie, 1 De G. M. & G. 441; Betts v. Union Bank, 1 H. & G. 175.

[5] Campion v. Cotton, 17 Ves. 264; Frazer v. Thompson, 1 Giff. 49; s. c. 4 De G. & J. 659; Richardson v. Horton, 7 Beav. 112; Herring v. Wickham, 29 Gratt. 628.

[6] Coutts v. Greenhow, 2 Munf. 363; s. c. 4 H. & M. 485; Herring v. Wickham, 29 Gratt. 628.

of a marriage a part of a scheme to protect property against the rights of creditors, the consideration of marriage can not support the settlement.[1] The question in every case is whether the settlement is a *bona fide* transaction or whether it is a trick and contrivance to defeat creditors.[2]

WIFE'S PARTICIPATION.—The wife, however, must be connected with the fraud to make the settlement invalid.[3] Fraud may be imputed to her either from direct co-operation in the original design at the time of its concoction, or from constructive co-operation by carrying the design into execution after she has received notice of it. The execution of the settlement after she has received notice of a fraudulent design renders her a participator and party to the fraud. It necessarily involves combination and participation.[4] Notice of the fraud may be inferred from the facts and circumstances of the settlement.[5] If the amount of property settled is extravagant, or grossly out of proportion to the station and circumstances of the husband, this of itself is sufficient notice of the fraud.[6]

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[1] Colombine v. Penhall, 1 Sm. & Gif. 228; *ex parte* Mayor, Mont. 292; Bulmer v. Hunter, L. R. 8 Eq. 46; s. c. 38 L. J. Ch. 543; s. c. 20 L. T. (N. S.) 942; Galbreath v. Cook, 30 Ark. 417; Prewitt v. Wilson, 103 U. S. 22; s. c. 3 Woods, 631. [2] Cadogan v. Kennett, 2 Cowp. 432.

[3] Campion v. Cotton, 17 Ves. 264; Bulmer v. Hunter, L. R. 8 Eq. 46; s. c. 38 L. J. Ch. 543; s. c. 20 L. T. (N. S.) 942; Rivers v. Thayer, 7 Rich. Eq. 136; Marshal v. Morris, 16 Geo. 368; Bonser v. Miller, 5 Oregon, 110; Herring v. Wickham, 29 Gratt. 628; Prewitt v. Wilson, 103 U. S. 22; s. c. 3 Woods, 631; Kevan v. Crawford, L. R. 6 Ch. Div. 29.

[4] Magniac v. Thompson, 7 Pet. 348; s. c. 1 Bald. 344; Gordon v. Worthley, 48 Iowa, 429.

[5] Colombine v. Penhall, 1 Sm. & Gif. 228; Bulmer v. Hunter, L. R. 8 Eq. 46; s. c. 38 L. J. Ch. 543; s. c. 20 L. T. (N. S.) 942.

[6] *Ex parte* McBurnie, 1 De G. M. & G. 441; Croft v. Arthur, 3 Dessau. 223; Herring v. Wickham, 29 Gratt. 628; Prewitt v. Wilson, 103 U. S. 22; s. c. 3 Woods, 631.

How far Valuable.—Marriage is sometimes put on the footing of a pecuniary consideration, and it is said that if a person sells his property for a full consideration, and squanders the money, his creditors have no redress. From this it is inferred that marriage will afford the same protection. But in the case of a *bona fide* sale, the seller parts with his property, the purchaser parts with his money, and the law will presume that the object is the payment of his debts. But the purchaser is not answerable for the misapplication of the money. It is not so with a marriage settlement. The seller does not, in fact, part with his property. It is still intended for his own enjoyment. Neither does he receive in turn anything that will satisfy his creditors. His wife will not be received in payment of his debts. It is not to be understood that, because marriage is equivalent to a pecuniary consideration, it is to be considered in the nature of an actual purchase. A settlement is not intended as the price of the wife, but as a provision for the family. It must, therefore, be reasonable, and with a due regard to the rights of others. Although a marriage contract can not be estimated in dollars and cents, yet some idea can be formed of what would constitute a comfortable provision for a family at the commencement of married life. And in forming a judgment of the *bona fides* of the transaction, an inquiry will be made as to the value of a man's property, the amount of his debts, the general state of his property, and the value of that belonging to his wife; and if the provision is found greatly disproportionate to his means, having regard to all these circumstances, it can not fail to excite a suspicion of fraud. Although marriage is a good consideration, and a settlement founded thereon may prevail even against creditors, it is not necessarily so

under all circumstances and to any extent. The reasonableness of it may as well be inquired into as the adequacy of price in a case of pecuniary consideration.[1] If, on such inquiry, it is ascertained that the property settled is comparatively small and not more than is sufficient for the comfortable maintenance of the family, the settlement will be valid if the wife is not a participant in the fraud.[2]

In Pursuance of Ante-nuptial Agreement.—A post-nuptial settlement, made in good faith, in pursuance of written marriage articles, is valid. The wife becomes a creditor of her husband by virtue of the marriage article, and if the settlement is made in part performance of the articles, *bona fide* and without fraud, it is simply a discharge of a legal obligation, and stands on the same footing as a preference to any other creditor.[3] Such a settlement may be made on the eve of the rendition of a judgment against the husband, but it must be real, and not merely colorable.[4]

Not in Conformity with Articles.—A settlement which goes beyond the marriage articles[5] or does not correspond with any precision to them[6] is a voluntary settle-

[1] Simpson v. Graves, 1 Riley Ch. 232; *ex parte* McBurnie, 1 De G. M. & G. 441; Croft v. Arthur, 3 Dessau. 223; Prewitt v. Wilson, 103 U. S. 22; s. c. 3 Woods, 631; *vide* Bank v. Marchand, T. U. P. Charlt. 247; Herring v. Wickham, 29 Gratt. 628.

[2] Rivers v. Thayer, 7 Rich. Eq. 136.

[3] Magniac v. Thompson, 7 Pet. 348; s. c. 1 Bald. 344; Lockwood v. Nelson, 16 Ala. 294; Brunsden v. Stratton, Prec. Ch. 520; Armfield v. Armfield, Freem. Ch. (Miss.) 311; Kinnard v. Daniel, 13 B. Mon. 496.

[4] Magniac v. Thompson, 7 Pet. 348; s. c. 1 Bald. 344.

[5] Saunders v. Ferrill, 1 Ired. 97; Shaw v. Jakeman, 4 East. 206.

[6] Reade v. Livingston, 3 Johns. Ch. 481; Blow v. Maynard, 2 Leigh, 29; Simpson v. Graves, 1 Riley Ch. 232; Shaw v. Jakeman, 4 East. 206.

ment. When the articles stipulate that the husband shall furnish a house in a suitable manner, as he shall judge fit and proper, he has a discretion which he may exercise in a reasonable manner, according to his station and associations in life. If he furnishes it extravagantly, or at a useless and wanton expense, he does not act within the true spirit and meaning of the articles, and commits a fraud on his creditors as to the excess.[1] The mere recital of the existence of articles in the settlement is not binding upon the creditors, and they may show that no such articles were made at the time of the marriage.[2]

PAROL ANTE-NUPTIAL AGREEMENT.—The statute of frauds[3] enacts that no action shall be brought to charge any person upon any agreement made upon consideration of marriage, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. A parol agreement in consideration of marriage constitutes a demand that can not be enforced, because it is within the prohibition of this act, and consequently a settlement made in consideration of such an agreement is without any legal consideration and voluntary.[4] Neither marriage,[5] nor a written acknowledgment

[1] Magniac v. Thompson, 7 Pet. 348; s. c. 1 Bald. 344.

[2] Battersbee v. Farrington, 1 Swanst. 106; s. c. 1 Wils. 88; Reade v. Livingston, 3 Johns. Ch. 481; Simpson v. Graves, 1 Riley Ch. 219.

[3] 29 Car. II, c. 3, s. 4.

[4] Dygert v. Remerschneider, 32 N. Y. 629; s. c. 39 Barb. 417; Warden v. Jones, 2 De G. & J. 76; s. c. 27 L. J. Ch. 190; Dundas v. Dutens, 2 Cox, 235; s. c. 1 Ves. Jr. 196; Spurgeon v. Collier, 1 Eden, 55; Murphy v. Abraham, 15 Ir. Eq. (N. S.) 371; Reade v. Livingston, 3 Johns. Ch. 481; Smith v. Greer, 3 Humph. 118; Randall v. Morgan, 12 Ves. 67;

after marriage,[1] nor a representation at the time of the marriage that a post-nuptial settlement will be valid,[2] can give validity to the settlement when otherwise void, or exempt it from the operation of the statute. Representations which are not inserted in the marriage contract, and to which no reference is made in the settlement, can not be enforced, and will not uphold a subsequent settlement.[3] A settlement in consideration of a previous marriage, without the recital of any articles, is a voluntary settlement.[4]

In Consideration of Portion.—If after marriage a settlement is made by the husband upon his wife in consideration of a portion or a sum of money advanced by another person, such settlement will be good and for a valuable consideration.[5] Whether the money is paid before or after the settlement is not material if the settlement is made in consideration of the payment or the

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Hayes v. Jones, 2 Pat. & H. 583; Andrews v. Jones, 10 Ala. 400; Wood v. Savage, 2 Doug. (Mich.) 316; s. c. Walk. Ch. 471; Borst v. Corey, 16 Barb. 136; Izzard v. Izzard, 1 Bailey Ch. 228; Simpson v. Graves, Riley Ch. 219; *vide* Loeffes v. Lewen, Prec. Ch. 370; Hall v. Light, 2 Duvall, 358; Hussey v. Castle, 41 Cal. 239.

[5] Warden v. Jones, 2 De G. & J. 76; s. c. 27 L. J. Ch. 190.

[1] Randall v. Morgan, 12 Ves. 67; Reade v. Livingston, 3 Johns. Ch. 481; Jones v. Henry, 3 Litt. 427; Satterthwaite v. Emley, 4 N. J. Eq. 489.

[2] Warden v. Jones, 2 De G. & J. 76; s. c. 27 L. J. Ch. 190; Simpson v. Graves, 1 Riley Ch. 219.

[3] Murphy v. Abrahams, 15 Ir. Eq. (N. S.) 371; Saunders v. Ferrell, 1 Ired. 97.

[4] Beaumont v. Thorp, 1 Ves. 27; Reade v. Livingston, 3 Johns. Ch. 481; Deubell v. Fisher, R. M. Charlt. 36.

[5] Wheeler v. Caryl, Amb. 121; Nunn v. Wilsmore, 8 T. R. 521; Stileman v. Ashdown, 2 Atk. 477, 607; s. c. Ambl. 13; Jones v. Marsh, Cas. temp. Talb. 64; Anon. Prec. Ch. 101; Russell v. Hammond, 1 Atk. 14; Ramsden v. Hylton, 2 Ves. Sr. 304; Gardner v. Painter, Cas. temp. King, 65; Brown v. Jones, 1 Atk. 188.

promise to pay.[1] If a father secures the portion which his daughter is entitled to under her mother's marriage settlement upon his own estate, and the portion so secured is subsequently paid to the husband, it is a valuable consideration for a settlement.[2]

DEED OF SEPARATION.—An agreement between a husband and his wife to live separate is not a sufficient consideration to support a conveyance from him to her.[3] If a *feme covert*, however, is entitled, on account of the misconduct of her husband, to obtain a divorce, and to have a proper allowance from him, she may, instead of strictly prosecuting that right, accept a maintenance from him, and the settlement will be upheld against creditors.[4] On account of the disability which at common law prohibited the husband and his wife from making a valid contract between each other, a deed of separation is always made through the intervention of a trustee.[5] A covenant by the trustee to indemnify the husband against any claim for alimony[6] or the debts which the wife may contract after the separation is a valuable consideration for the settlement.[7] If the trustee does not execute the deed of separation,[8] or omits to indemnify the husband against any claim for alimony or the debts of the wife,[9] the settlement is without a valuable consideration to support it. A com-

[1] Brown v. Jones, 1 Atk. 188. [2] Wheeler v. Caryl, Amb. 121.

[3] Morgan v. Potter, 24 N. Y. Supr. 403.

[4] Hobbs v. Hull, 1 Cox, 445. [5] Legard v. Johnson, 3 Ves. 352.

[6] Worrall v. Jacob, 3 Mer. 256.

[7] Stephens v. Olive, 2 Brock. 90; Worrall v. Jacob, 3 Mer. 256; Wells v. Stout, 9 Cal. 479; King v. Brewen, 2 Brock. 93 note; Hargroves v. Meray, 2 Hill Ch. 222.

[8] Legard v. Johnson, 3 Ves. 352; Wells v. Stout, 9 Cal. 479.

[9] Cropsey v. McKinney, 30 Barb. 47; Fitzer v. Fitzer, 2 Atk. 511; Nunn v. Wilsmore, 8 T. R. 521; Clough v. Lambert, 10 Sim. 174.

plete condonation immediately after the execution of a deed of separation takes away all consideration therefor and leaves it a voluntary settlement.[1]

Contract between Husband and Wife.—A husband may, either with[2] or without[3] the intervention of a trustee, enter into a contract with his wife for a valuable consideration, and a settlement made in pursuance of such an agreement will be good against prior as well as subsequent creditors. Such settlements, however, are always watched with considerable jealousy, on account of the relative situation of the parties, and the convenient cover they afford to a debtor to protect his property and impose upon his creditors,[4] and the payment of a valuable consideration must be made out by proof of the most unquestionable character.[5]

Wife's Property.—Whether the consideration is valuable will depend upon its character. By the common

[1] Kehr v. Smith, 20 Wall. 31; s. c. 2 Dill. 50; s. c. 7 N. B. R. 97; s. c. 10 N. B. R. 49.

[2] Bank v. Lee, 13 Pet. 107; Arundell v. Phipps, 10 Ves. 139; Duffy v. Insurance Co., 8 S. & R. 413.

[3] Schaffner v. Reuter, 37 Barb. 44; Wickes v. Clarke, 8 Paige, 161; s. c. 2 Edw. Ch. 58; Babcock v. Eckler, 24 N. Y. 623; Stockett v. Holliday, 9 Md. 480; Dygert v. Remerschneider, 32 N. Y. 629; s. c. 39 Barb. 417; Bullard v. Briggs, 24 Mass. 533; Bank v. Brown, Riley Ch. 131; s. c. 2 Hill Ch. 558; Miller v. Tolleson, Harp. Ch. 145; Barron v. Barron, 24 Vt. 375; Steadman v. Wilbur, 7 R. I. 481; Syracuse Chilled Plow Co. v. Wing, 27 N. Y. Supr. 206; s. c. 85 N. Y. 421.

[4] Blow v. Maynard, 2 Leigh, 29; Alston v. Rowles, 13 Fla. 117; Campbell v. Waters, 12 La. An. 193; Bogan v. Finlay, 19 La. An. 94; Hoxie v. Price, 31 Wis. 82; Booker v. Worrill, 57 Geo. 235; Thompson v. Feagin, 60 Geo. 82; Dresher vs. Corson, 23 Kans. 313; Tomlinson v. Matthews, 98 Ill. 178.

[5] Alston v. Rowles, 13 Fla. 117; Wilson v. Silkman, 97 Penn. 509; Monteith v. Bax, 4 Neb. 166; Horton v. Dewey, 53 Wis. 410; McGinnis v. Curry, 13 W. Va. 29; Fisher v. Shelver, 53 Wis. 498; Warren v. Ranney, 50 Vt. 653.

law the husband by marriage became the purchaser and owner of his wife's personal property, and obtained the right to reduce her *choses in action* to possession, and appropriate them for his own benefit. Her personal property and money, therefore, do not at common law constitute a valuable consideration for a promise made by him to her,[1] unless she was allowed by him to retain her separate estate.[2] If her *choses in action* have been reduced to possession, they belong absolutely to him, and do not constitute a valuable consideration any more than her personal property.[3]

A WIFE'S CHOSES IN ACTION.—A *chose in action* which is not reduced to possession remains the property of the wife, and does not vest in the husband by the marriage. The marital right does not extend to the property while a *chose in action*, but enables the husband to reduce it to possession and thereby acquire it. The property becomes his, not upon the marriage, but upon the fact of his obtaining possession. Her *choses in action*, therefore, may be settled upon her, and will also constitute a valuable con-

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[1] Harvey v. Alexander, 1 Rand. 219; Farmers' Bank v. Long, 7 Bush, 337; Lewis v. Caperton, 8 Gratt. 148; Coates v. Gerlach, 44 Penn. 43; Lyne v. Bank of Ky., 5 J. J. Marsh. 545; Bank v. Mitchell, 1 Rice Eq. 389; Beach v. White, Walk Ch. 495; Briggs v. Mitchell, 60 Barb. 288; Smith v. Duncan, 2 Pitts. L. J. 186; Dick v. Hamilton, 1 Deady, 322; Alston v. Rowles, 13 Fla. 117; Gieker v. Martin, 50 Penn. 138; Howe v. Colby, 19 Wis. 583; Allen v. Walt, 9 Heisk. 242.

[2] Woodworth v. Sweet, 51 N. Y. 8; s. c. 44 Barb. 268; Jaycox v. Caldwell, 51 N. Y. 395; s. c. 37 How. Pr. 240.

[3] Wylie v. Basil, 4 Md. Ch. 327; Whittlesey v. McMahon, 10 Conn. 137; Pierce v. Thompson, 34 Mass. 391; Hurdt v. Courtenay, 4 Met. (Ky.) 139; Briggs v. Mitchell, 60 Barb. 288; Lewis v. Caperton, 8 Gratt. 148; Barker v. Woods, 1 Sandf. Ch. 129; Hatch v. Gray, 21 Iowa, 29; Glass v. Farmer, 10 Heisk. 551.

sideration for a contract with her.[1] So, also, if her money is in the hands of another who withholds it until the husband makes a provision for her, it will support the settlement.[2]

RIGHT TO SETTLEMENT.—If her property is only recoverable in equity,[3] or has come to her during coverture by gift or inheritance,[4] she is entitled to a settlement, which a court of equity will invariably enforce in favor of the wife, and even the children of the marriage, against the husband and all claiming under him, such as assignees or creditors. The same circumstances which would induce a court of equity to compel a settlement by the husband or those claiming under him or in his right, will operate

[1] Blake v. Jones, 1 Bailey Ch. 141; Gallego v. Gallego, 2 Brock. 285; Pierce v. Thompson, 34 Mass. 391; Athey v. Knotts, 6 B. Mon. 24; Gore v. Waters, 2 Bailey, 477; Nims v. Bigelow, 45 N. H. 343; Wheeler v. Emerson, 44 N. H. 182; Ready v. Bragg, 1 Head. 511; Gassett v. Grout, 45 Mass. 486; McCaulay v. Rodes, 7 B. Mon. 462; Mechanics' Bank v. Taylor, 2 Cranch C. C. 409; Ryan v. Bull, 3 Strobh. Eq. 86; Estate of Donnelly, 2 Phila. 51; Barron v. Barron, 24 Vt. 375; Standiford v. Devoe, 21 Ind. 404; Stoner v. Commonwealth, 16 Penn. 387; Coffin v. Morrill, 22 N. H. 352; *vide* Allen v. Allen, 6 Ired. Eq. 293; Dold v. Geiger, 2 Gratt. 98.

[2] Brown v. Jones, 1 Atk. 188; Middlecome v. Marlow, 2 Atk. 519; Pott v. Todhunter, 2 Coll. 76; Gassett v. Grout, 45 Mass. 486; Bank v. Brown, Riley Ch. 131; s. c. 2 Hill Ch. 558; Wickes v. Clarke, 8 Paige, 161; s. c. 2 Edw. Ch. 58; Ryan v. Bull, 3 Strobh. Eq. 86; Poindexter v. Jeffries, 15 Gratt. 363; Kennedy v. Head, 32 Geo. 629; *vide* Robinett's Appeal, 36 Penn. 174.

[3] Wheeler v. Caryl, Amb. 121; Legard v. Johnson, 3 Ves. 352; Moore v. Rycault, Prec. Ch. 22; Bank v. Brown, Riley Ch. 131; s. c. 2 Hill Ch. 558; Poindexter v. Jeffries, 15 Gratt. 363; Marshall v. McDaniel, 8 B. Mon. 175; Spirett v. Willows, 3 De J. G. & S. 293; s. c. 11 Jur. (N. S.) 70; 34 L. J. Ch. 365; L. R. 1 Ch. 520; 14 L. T. (N. S.) 72; Barnard v. Ford, L. R. 4 Ch. 247; Bridgford v. Riddle, 55 Ill. 261.

[4] Wickes v. Clarke, 8 Paige, 161; s. c. 3 Edw. Ch. 58; Hinton v. Scott, Moseley, 336; Smith v. Greer, 3 Humph. 118; Bank v. Brown, Riley Ch. 131; s. c. 2 Hill Ch. 558; McCauley v. Rodes, 7 B. Mon. 462.

to uphold a settlement already made to the same extent that would be required if one should be directed to be made under the view of the court, for the parties may do voluntarily what the law would compel them to do. The settlement should be reasonable and adequate, and may be of a part or the whole of the property according to the circumstances.[1] If it is reasonable at the time it is made, it will not be impaired by subsequent acquisitions.[2]

WIFE'S SEPARATE ESTATE.—Her land[3] or separate estate[4] constitutes a valuable consideration for a settlement. If the husband's creditors levy upon his life estate in her lands, she may convey a portion of the ground to them as a consideration to induce them to unite with her in a transfer of the residue to a trustee for her benefit.[5] If her father makes a mistake as to the effect of a gift of land to her and her husband, they may unite in a surrender, and the property may then be given to her.[6] If her husband converts her separate property to his own

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[1] Poindexter v. Jeffries, 15 Gratt. 363.

[2] Marshall v. McDaniel, 8 B. Mon. 175.

[3] College v. Powell, 12 Gratt. 372; Clerk v. Nettlestrip, 2 Levinz, 148; Latimer v. Glenn, 2 Bush, 535; Wilson v. Ayer, 7 Me. 207; Duffy v. Insurance Co., 8 S. & R. 413; Barnett v. Goings, 8 Blackf. 284; Peiffer v. Lytle, 58 Penn. 386; Lee v. Hollister, 5 Fed. Rep. 750.

[4] Savage v. O'Neil, 44 N. Y. 298; Stockett v. Holliday, 9 Md. 480; Bank v. Lee, 13 Pet. 107; Cottle v. Tripp, 2 Vern. 220; Taylor v. Heriott, 4 Dessau. 227; Ward v. Shallett, 2 Ves. Sr. 16; Bank v. Brown, Riley Ch. 131; s. c. 2 Hill Ch. 558; Acraman v. Corbett, 1 J. & H. 410; Butler v. Ricketts, 11 Iowa, 107; Woodworth v. Sweet, 44 Barb. 268; s. c. 51 N. Y. 8; Kendrick v. Taylor, 27 Ark. 695; Lormore v. Campbell, 60 Barb. 62; Butterfield v. Stanton, 44 Miss. 15; Sweeney v. Damron, 47 Ill. 450; McLaurie v. Partlow, 53 Ill. 340; White v. Sansom, 3 Atk. 410; Hussey v. Castle, 41 Cal. 239; Teller v. Bishop, 8 Minn. 226; Monroe v. May, 9 Kans. 466.

[5] Hubbard v. Remick, 10 Me. 140.

[6] Barncord v. Kuhn, 36 Penn. 383.

use without her consent, this will be a good consideration for a transfer by him.[1] So, also, in case he purchases property with her separate funds, and takes the title in his own name, he may subsequently convey it to her, for this is only what the law would compel him to do.[2]

JOINING IN SETTLEMENT.—If a settlement can not be made without her aid, her joining in it will constitute a good consideration for a settlement in her favor.[3]

CONTINGENT RIGHT OF DOWER.—The relinquishment of a homestead right,[4] or the release of a contingent right of dower, is a valuable consideration.[5] A release without any promise,[6] or upon a mere expectation[7] of a recompense, or a mere promise to release,[8] is not a valuable consideration; but if the relinquishment is made on the faith of a promise, the transfer may be subsequent.[9]

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[1] Wiley v. Gray, 36 Miss. 510. [2] Wilson v. Sheppard, 28 Ala. 623.

[3] Harman v. Richards, 10 Hare, 81; Acraman v. Corbett, 1 J. & H. 410; Russell v. Hammond, 1 Atk. 14.

[4] Gwyer v. Figgins, 37 Iowa, 317.

[5] Marshall v. Hutchinson, 5 B. Mon. 298; Jones v. Boulter, 1 Cox, 288; Unger v. Price, 9 Md. 552; Ellinger v. Crowl, 17 Md. 361; Wright v. Stannard, 2 Brock. 311; Bullard v. Briggs, 24 Mass. 533; Quarles v. Lacy, 4 Munf. 251; Harrison v. Carroll, 11 Leigh, 476; Bank v. Brown, Riley Ch. 131; S. C. 2 Hill Ch. 558; Harvey v. Alexander, 1 Rand. 219; College v. Powell, 12 Gratt. 372; Hollowell v. Simonson, 21 Ind. 398; Cottle v. Tripp, 2 Vern. 220; Ward v. Crotty, 4 Met. (Ky.) 59; Low v. Carter, 21 N. H. 433; Nims v. Bigelow, 45 N. H. 343; Dick v. Hamilton, 1 Deady, 322; Hoot v. Sorrell, 11 Ala. 386; Motley v. Sawyer, 38 Me. 68; Patrick v. Patrick, 77 Ill. 555; Singree v. Welch, 32 Ohio St. 320; Reiff v. Eshleman, 52 Md. 582; Prewitt v. Wilson, 103 U. S. 22; S. C. 3 Woods, 631.

[6] Woodson v. Pool, 19 Mo. 340; Taylor v. Moore, 2 Rand. 563.

[7] Lewis v. Caperton, 8 Gratt. 148.

[8] Harrison v. Carroll, 11 Leigh, 476.

[9] College v. Powell, 12 Gratt. 372; Brown v. Rawlings, 72 Ind. 505.

NOT WITHOUT CONTRACT.—An estate previously received by the husband in the right of his wife is not a good consideration for a subsequent conveyance to her.[1] Even the appropriation of her separate estate with her knowledge and consent will not constitute a good consideration, unless there is an agreement by him to repay the money so appropriated;[2] for she is not allowed, as against his creditors, to convert a delivery of property to him, or a receipt of money by him, into a debt, when the delivery or receipt at the time was intended as a gift to assist him in his business or to pay their common expenses. From such a delivery or receipt merely the law does not imply a promise on his part to repay or replace, but requires either an express promise or circumstances to prove that in these matters they dealt with each other as debtor and creditor. This is especially true if he has for a long time been allowed to hold himself out to the world as the owner of the property, and contract debts upon the credit of such ownership.[3] But if there is a promise to repay her, that is a sufficient consideration to

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[1] Lyne v. Bank of Ky., 5 J. J. Marsh. 545; Hurdt v. Courtenay, 4 Met. (Ky.) 139; Farmers' Bank v. Long, 7 Bush. 337; Bridgford v. Riddell, 55 Ill. 261; Hill v. Wynn, 4 W. Va. 453; Carpenter v. Carpenter, 25 N. J. Eq. 194.

[2] Kuhn v. Stansfield, 28 Md. 210; Blow v. Maynard, 2 Leigh, 29; Wickes v. Clarke, 8 Paige, 161; s. c. 3 Edw. Ch. 58; Paulk v. Cooke, 39 Conn. 566; Annin v. Annin, 24 N. J. Eq. 184; Clark v. Rosenkrans, 31 N. J. Eq. 665; Luers v. Brunges, 34 N. J. Eq. 19, 561; Humes v. Scruggs, 94 U. S. 22; Patton v. Gates, 67 Ill. 174; Odell v. Flood, 8 Ben. 543; Monteith v. Bax, 4 Neb. 166; Wake v. Griffin, 9 Neb. 47; McGinnis v. Curry, 13 W. Va. 29; Warren v. Ranney, 50 Vt. 653; Russell v. Thatcher, 2 Del. Ch. 320.

[3] Besson v. Eveland, 26 N. J. Eq. 468; Humes v. Scruggs, 94 U. S. 22; Patten v. Gates, 67 Ill. 174; Hockett v. Bailey, 86 Ill. 74; Odell v. Flood, 8 Ben. 543; Russell v. Thatcher, 2 Del. Ch. 320.

support a subsequent conveyance.[1] An express promise, however, is not indispensable. Inferential proof is not to be rejected upon such a subject more than upon any other, although what are proper inferences may be modified or altered by the relation of the parties. The amounts received, the times when, the occasions, the application of the amounts, the conduct of the parties at or about the times, their relative condition as to property, the time and circumstances attending the payment or security out of the estate of the husband, and the relative value of what has been received and paid, especially if paid by a conveyance of the husband's property, are all proper sources of inferences upon such a question, as they would be upon a similar question between other parties.[2] Nor is it necessary that there shall be a promise at the time of each delivery or receipt of her separate estate. A promise made before such transactions, and looking forward to and covering them, will avail as well to prove the character of them, as it would between other parties who are dealing with each other on credit and in confidence.[3]

How far Valid.—When a settlement is valid, the increase[4] and property purchased with the proceeds of the estate settled are within its protection.[5] A defective

[1] Syracuse Chilled Plow Co. v. Wing, 83 N. Y. 421; s. c. 27 N. Y. Supr. 206; Brookville Nat'l Bank v. Trimble, 76 Ind. 195; Van Kleeck v. Miller, 19 N. B. R. 484.

[2] Steadman v. Wilbur, 7 R. I. 481; Gicker v. Martin, 50 Penn. 138.

[3] Steadman v. Wilbur, 7 R. I. 481.

[4] Hazelinton v. Gill, 3 T. R. 620, note; s. c. 3 Doug. 415; Hoot v. Sorrell, 11 Ala. 386.

[5] Jarman v. Woolloton, 3 T. R. 618; Blanchard v. Ingersoll, 4 Dall. 305; Wieman v. Anderson, 42 Penn. 311; Conrad v. Shomo, 44 Penn. 193; Brown v. Pendleton, 60 Penn. 419; Yardley v. Raub, 5 Whart. 117.

settlement, which is otherwise valid, is good in equity against the creditors.[1]

PURCHASES BY FEME COVERT.—The possession of the wife is *prima facie* the possession of the husband, and consequently raises a presumption of ownership in him.[2] In case of a purchase by a wife during coverture, the burden is upon her to prove distinctly that she paid for the thing purchased with funds that were not furnished by the husband. Evidence that she purchased amounts to nothing, unless it is accompanied by clear and full proof that she paid for it with her own separate funds—not that she has the means of paying, but that she in fact paid. In the absence of such proof the presumption is that her husband furnished the means of payment. This rule applies to purchases of real as well as personal estate,[3] especially if the husband makes the purchase.[4]

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[1] Brown v. Jones, 1 Atk. 188.

[2] Primrose v. Browning, 59 Geo. 69; Eeley v. Faith, 4 Bradw. 275.

[3] Winter v. Walter, 37 Penn. 155; Gamber v. Gamber, 18 Penn. 363; Keeney v. Good, 21 Penn. 349; Walker v. Reamy, 36 Penn. 410; Black v. Nease, 37 Penn. 433; Mercer v. Miller, 5 Fla. 277; Parvin v. Capewell, 45 Penn. 89; Gault v. Saffin, 44 Penn. 307; Rhodes v. Gordon, 38 Penn. 277; Aurand v. Shaffer, 43 Penn. 363; Flick v. Devries, 50 Penn. 266; Earl v. Champion, 65 Penn. 191; Tripner v. Abraham, 47 Penn. 220; Auble v. Mason, 35 Penn. 261; Raines v. Woodward, 4 Rich. Eq. 399; Mangum v. Finucane, 38 Miss. 354; Rose v. Brown, 11 W. Va. 122; Hinkle v. Wilson, 53 Md. 287; Seitz v. Mitchell, 98 U. S. 580; Bisson v. Eveland, 26 N. J. Eq. 468; Post v. Stiger, 29 N. J. Eq. 554; Clark v. Rosenkrans, 31 N. J. Eq. 665; Stanton v. Kirsch, 6 Wis. 338; Horneffer v. Duress, 13 Wis. 603; Duress v. Horneffer, 15 Wis. 195; *vide* Stall v. Fulton, 30 N. J. 430.

[4] Conway v. Brown, 5 Tenn. 237.

CHAPTER XIII.

SUBSEQUENT CREDITORS.

Rights at Common Law.—In Twyne's Case[1] it is said that by the common law an estate made by fraud can be avoided only by him who has a former right, title, interest, debt, or demand, as a sale in open market by covin will not bar a right which is more ancient, and a covinous gift will not defeat an execution in respect to a former debt, but he who hath right, title, interest, debt, or demand more puisne can not avoid a gift or estate precedent by the common law. It will be observed, however, that these remarks, as far as they affect subsequent creditors, are mere dicta, and not supported by any decided case. It is, moreover, difficult to perceive upon what ground they rest. Even at the common law fraud vitiates every transaction into which it enters, and fraud accompanied with damage always gives a right of action. These well-recognized principles are sufficient to protect even subsequent creditors. The better doctrine, therefore, even in this respect, is that the principles and rules of the common law as now known and understood would have attained every end proposed by the statute.[2] The principles, however, had not been previously recognized and applied, and the statute thus had the effect of introducing new principles.

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[1] 3 Co. 80.

[2] Cadogan v. Kennett, 2 Cowp. 432.

WITHIN STATUTE.—The statute embraces not merely conveyances made with intent to delay, hinder or defraud creditors, but conveyances made with the intent to delay, hinder or defraud others. The word "others" is inserted to take in all manner of persons, as well creditors after as before the conveyance, whose debts should be defrauded. The enacting clause is still stronger because the word "creditors" is not mentioned, but general words "person or persons." The words of the statute seem to be so general in order to take in all persons who shall be in any ways hindered.[1] It is accordingly well settled that if a party makes a conveyance of his property with the express intent to become indebted to another, and to defraud him of his debt by means of this artifice, such subsequent creditor may contest and by proof defeat the transfer, although he was not a creditor of the grantor at the time of the conveyance.[2]

KIND OF INTENT.—The intent which will in general make such a transfer void is an actual intent to defraud, and must be proved,[3] and the burden of proof rests

[1] Taylor v. Jones, 2 Atk. 600.

[2] Littleton v. Littleton, 1 Dev. & Bat. 327; Ridgeway v. Underwood, 4 Wash. C. C. 129; Howe v. Ward, 4 Me. 195; Shontz v. Brown, 27 Penn. 123; Black v. Nease, 37 Penn. 433; Russell v. Stinson, 3 Heyw. 1; New Haven Steamboat Co. v. Vanderbilt, 16 Conn. 420; Cook v. Johnson, 12 N. J. Eq. 51; National Bank v. Sprague, 20 N. J. Eq. 13; Barling v. Bishopp, 29 Beav. 417; Stileman v. Ashdown, 2 Atk. 477, 607; s. c. Ambl. 13; Murphy v. Abraham, 15 Ir. Eq. (N. S.) 371; Miller v. Wilson, 15 Ohio, 108; Anon. 1 Wall. Jr. 107; Lyman v. Cessford, 15 Iowa, 229; Bogard v. Gardley, 12 Miss. 302; Williams v. Banks, 11 Md. 198; s. c. 19 Md. 22; U. S. v. Steiner, 8 Blatch. 544; Hilliard v. Cagle, 46 Miss. 309; Candee v. Lord, 2 N. Y. 269; McPherson v. Kingsbaker, 22 Kans. 646.

[3] Reid v. Gray, 37 Penn. 508; Horn v. Ross, 20 Geo. 210; Cole v. Varner, 31 Ala. 244; Lynch v. Raleigh, 3 Ind. 273; Nicholas v. Ward, 1 Head, 323; Blake v. Jones, 1 Bailey Ch. 141; Rivers v. Thayer, 7 Rich. Eq. 136; Matthai v. Heather, 57 Md. 483.

upon the subsequent creditor.[1] It is not necessary, however, to prove such intent by direct and express evidence, for this would be impracticable in many instances where the conveyance ought not to be established. The intent may be collected from the circumstances of the case, and such badges of fraud as the transaction wears.[2] Some of the usual badges are the omission to record the conveyance,[3] possession of the property and obtaining a false credit thereby,[4] the subsequent erection of improvements,[5] the magnitude of the conveyance compared with the grantor's means,[6] the existence of prior debts at the time of the transfer,[7] the concealment[8] of the transfer, the im-

[1] Loeschigk v. Hatfield, 5 Robt. 26; s. c. 4 Abb. Pr. (N. S.) 210; 51 N. Y. 660; Nicholas v. Ward, 1 Head, 323.

[2] Hutchinson v. Kelly, 1 Rob. 123; Larkin v. McMullin, 49 Penn. 29; Thomson v. Dougherty, 12 S. & R. 448; Bogard v. Gardley, 12 Miss. 302; Wright v. Henderson, 8 Miss. 539; Johnston v. Zane, 11 Gratt. 552; Carr v. Breese, 25 N. Y. Supr. 134; Rose v. Brown, 11 W. Va. 122; Lockhard v. Beckley, 10 W. Va. 87.

[3] Lyman v. Cessford, 15 Iowa, 229; Naylor v. Baldwin, Rep. Ch. 69; Beeckman v. Montgomery, 14 N. J. Eq. 106; Case v. Phelps, 39 N. Y. 164; *in re* Rainsford, 5 N. B. R. 381; Keating v. Keefer, 5 N. B. R. 133; s. c. 4 A. L. T. 162; Hilliard v. Cagle, 46 Miss. 309; Pendleton v. Hughes, 65 Barb. 136; Hawley v. Sackett, 6 N. Y. Supr. 322; Sexton v. Wheaton, 8 Wheat. 229; Bank v. Patton, 1 Rob. 499; Dick v. Hamilton, Deady, 322; City Nat'l Bank v. Hamilton, 34 N. J. Eq. 158; Platt v. Mead, 9 Fed. Rep. 91; Crawford v. Logan, 97 Ill. 396.

[4] Pell v. Treadwell, 5 Wend. 661; Bradley v. Buford, Ky. Dec. 12; Farmers' Bank v. Long, 7 Bush. 337; Ayer v. Bartlett, 23 Mass. 71; Merrill v. Rinker, 1 Bald. 528; Carter v. Grimshaw, 49 N. H. 100.

[5] Tappan v. Butler, 7 Bosw. 480; Dick v. Hamilton, Deady, 322; Hitchcock v. Kiely, 41 Conn. 611; Platt v. Mead, 9 Fed. Rep. 91.

[6] Belford v. Crane, 16 N. J. Eq. 265; Rivers v. Thayer, 7 Rich. Eq. 136.

[7] Richardson v. Rhodus, 14 Rich. 95; Huggins v. Perrine, 30 Ala. 396; Redfield v. Buck, 35 Conn. 328; Pawley v. Vogel, 42 Mo. 291.

[8] Hungerford v. Earle, 2 Vern. 261; Sands v. Hildreth, 2 Johns. Ch. 35; s. c. 14 Johns. 493; Lewkner v. Freeman, 2 Freem. 236; s. c. Prec. Ch. 105; Eq. Cas. Abr. 149; Hilliard v. Cagle, 46 Miss. 309; Madden v. Day, 1 Bailey, 337, 587; Snyder v. Christ, 39 Penn. 499; Mixell v. Lutz, 34 Ill. 382; Roberts v. Gibson, 6 H. & J. 116.

mediate engagement in a hazardous business,[1] and the contracting of debts immediately after the transfer.[2]

MERE SUBSEQUENT INDEBTEDNESS.—The simple fact of a subsequent indebtedness is not sufficient to make a transfer fraudulent. There must exist at the time on the part of the grantor a fraudulent view, and until this fraudulent purpose is established, either by positive proof or the exhibition of such facts as justify the inference of its actual existence, the conveyance can not be set aside.[3] Even a mere expectation of indebtedness, or an intent to contract debts, if there is only an intent not coupled with a fraudulent purpose to convey the property in order to keep it from being reached by creditors, will not render the transfer invalid.[4] The mere intent to keep the property from subsequent creditors is not alone sufficient. No conveyance can be made which may not in certain contingencies

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[1] Mullen v. Wilson, 44 Penn. 413; Thomson v. Dougherty, 12 S. & R. 448; Beeckman v. Montgomery, 14 N. J. Eq. 106; Cramer v. Reford, 17 N. J. Eq. 367; Carpenter v. Roe, 10 N. Y. 227; Case v. Phelps, 39 N. Y. 164; Lyne v. Bank of Ky., 5 J. J. Marsh. 545; Mackay v. Douglass, 26 L. T. (N. S.) 71; s. c. L. R. 14 Eq. 106; Hilliard v. Cagle, 46 Miss. 309; Williams v. Davis, 69 Penn. 21; Carpenter v. Carpenter, 25 N. J. Eq. 194; Hawley v. Sackett, 6 N. Y. Supr. 322; Fisher v. Lewis, 69 Mo. 629; Burdick v. Gill, 7 Fed. Rep. 668.

[2] Barling v. Bishopp, 29 Beav. 417; Case v. Phelps, 39 N. Y. 164; Bullitt v. Taylor, 34 Miss. 708; Lyman v. Cessford, 15 Iowa, 229; Snyder v. Christ, 39 Penn. 499; Mason v. Rogers, 1 Root, 324; Thomson v. Dougherty, 12 S. & R. 448; Herschfeldt v. George, 6 Mich. 456; Churchill v. Wells, 7 Cold. 364; Ware v. Gardner, L. R. 7 Eq. 317; 17 W. R. 439; Mackay v. Douglas, 26 L. T. (N. S.) 71; s. c. L. R. 14 Eq. 106; Carter v. Grimshaw, 49 N. H. 100; Mellon v. Mulvey, 23 N. J. Eq. 198; City Nat'l Bank v. Hamilton, 34 N. J. Eq. 158; Clark v. Killian, 103 U. S. 766; s. c. 3 MacArthur, 379.

[3] Lyman v. Cessford, 15 Iowa, 229.

[4] Snyder v. Christ, 39 Penn. 499; Williams v. Davis, 69 Penn. 21; Harlan v. Maglaughlin, 90 Penn. 293.

tend to put property beyond the reach of the creditors of the grantor, and the happening of such contingencies may be reasonably supposed to be within the contemplation of every person who does not intend to withdraw himself from the active pursuits of life. But such a conveyance is not for that reason void as against subsequent creditors, unless it is also made with a design to defraud them.[1] The conveyance must be made with an intent to put the property out of the reach of debts which the grantor at the time of the conveyance intends to contract, and which he does not intend to pay, or has reasonable grounds to believe that he may not be able to pay. There need not be an intent to contract any particular debt or debts. It is sufficient if there is an intent to contract debts, and a design to avoid the payment of such debts by the conveyance.

Actual Intent.—If a conveyance is made with direct reference to immediate future indebtedness, and with the actual intent to deprive the future creditor of a security upon which he has a right to rely, such intent is actually fraudulent. Persons to whom a debt accrues have a right to expect that their debtor will deal fairly and in good faith with them, and if upon the eve of an indebtedness about to be incurred and with a view thereto, and without the knowledge of the party extending the credit, the debtor makes a voluntary conveyance of property upon which he knows that his contemplated creditor relies or has a right to rely, this is an actual fraud upon such sub-

[1] Smith v. Tatton, 6 L. R. Ir. 32.

[2] Winchester v. Charter, 94 Mass. 606; s. c. 97 Mass. 140; s. c. 102 Mass. 272.

sequent creditor.[1] Such an act will not be relieved of its fraudulent character by the mere fact that the conveyance is placed upon record, if the creditor has no actual notice, and the conveyance without his negligence operates as a surprise upon him.[2]

NOT MERE VOLUNTARY CONVEYANCE.—A voluntary conveyance made in good faith, and valid against creditors whose debts exist at the time of its execution, is also valid against subsequent creditors.[3] In such a case the

[1] Churchill v. Wells, 7 Cold. 364; Beeckman v. Montgomery, 14 N. J. Eq. 106; Barling v. Bishopp, 29 Beav. 417; Case v. Phelps, 39 N. Y. 164; Bullitt v. Taylor, 34 Miss. 708; Mellon v. Mulvey, 23 N. J. Eq. 198; Woodruff v. Ritter, 26 N. J. Eq. 86; White v. Beltis, 9 Heisk. 645.

[2] Churchill v. Wells, 7 Cold. 364; Moore v. Blondheim, 19 Md. 172; Mellon v. Mulvey, 23 N. J. Eq. 198; White v. Beltis, 9 Heisk. 645; Burdick v. Gill, 7 Fed. Rep. 668; Platt v. Mead, 9 Fed. Rep. 91; Levering v. Norvell, 9 Baxter, 176.

[3] Shaw v. Standish, 2 Vern. 226; Kipp v. Hanna, 2 Bland, 26; Kidney v. Coussmaker, 12 Ves. 136; Sagitary v. Hide, 2 Vern. 44; Walker v. Burrows, 1 Atk. 93; Townsend v. Windham, 2 Ves. Sr. 1; Roberts v. Gibson, 6 H. & J. 116; Holmes v. Penney, 3 K. & J. 90; Mattingly v. Nye, 8 Wall. 370; Pike v. Miles, 23 Wis. 164; Lormore v. Campbell, 60 Barb. 62; Place v. Rhem, 7 Bush, 585; Tappan v. Butler, 7 Bosw. 480; Pierson v. Heisey, 19 Iowa, 114; Vance v. Smith, 2 Heisk. 343; Horn v. Volcano Water Co., 13 Cal. 62; Whitescarver v. Bonny, 9 Iowa, 480; Hamilton v. Thomas, 3 Heyw. 127; Hanson v. Power, 8 Dana, 91; Winn v. Barnett, 31 Miss. 653; Johnston v. Zane, 11 Gratt. 552; Smith v. Littlejohn, 2 McCord, 362; Pepper v. Carter, 11 Mo. 540; Haskell v. Bakewell, 10 B. Mon. 106; Crumbaugh v. Kugler, 2 Ohio St. 373; Gugen v. Sampson, 4 F. & F. 974; Abbott v. Hurd, 7 Blackf. 510; Anon. 1 Wall. Jr. 107; Ingram v. Phillips, 3 Strobh. Ch. 565; Holloway v. Millard, 1 Madd. 414; Wells v. Stout, 9 Cal. 479; Niller v. Johnson, 27 Md. 6; Charlton v. Gardner, 11 Leigh, 281; Thomas v. DeGraffenreid, 17 Ala. 602; Cole v. Varner, 31 Ala. 244; Waterson v. Wilson, 1 Grant, 74; Kid v. Mitchell, 1 N. & M. 334; Usher v. Hazeltine, 5 Me. 471; Stiles v. Lightfoot, 26 Ala. 443; Richardson v. Rhodus, 14 Rich. 95; Page v. Kendrick, 10 Mich. 300; Converse v. Hartley, 31 Conn. 372; Benton v. Jones, 8 Conn. 186; Hurdt v. Courtenay, 4 Met. (Ky.) 139; Lyman v.

character or amount of the consideration is immaterial and not the subject of inquiry. If there is no evidence of fraud in fact in the execution of a deed, or any subsequent acts from which fraud can be legally inferred, subsequent creditors can not be permitted to inquire into the fact whether the consideration expressed is the true consideration. In other words, they are in no better situation than the grantor himself through whom they claim, who is estopped to deny that the consideration stated in the deed

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Cessford, 15 Iowa, 229; Mixell v. Lutz, 34 Ill. 382; Bohn v. Headley, 7 H. & J. 257; Reade v. Livingston, 3 Johns. Ch. 481; Bennett v. Bedford Bank, 11 Mass. 421; Lyne v. Bank of Kentucky, 5 J. J. Marsh. 545; Botts v. Cozine, Hoff. 79; Iley v. Niswanger, 1 McCord Ch. 518; s. c. 1 Harp. Ch. 295; Howard v. Williams, 1 Bailey, 575; Adams v. Adams, 1 Dane Ab. 628, 636; Loeschigk v. Hatfield, 5 Robt. 26; s. c. 4 Abb. Pr. (N. S.) 210; s. c. 51 N. Y. 660; Wilbur v. Fradenburgh, 52 Barb. 474; Holmes v. Clark, 48 Barb. 237; Howe v. Ward, 4 Me. 195; Bank v. Patton, 1 Rob. 499; Nicholas v. Ward, 1 Head, 323; Martin v. Oliver, 9 Humph. 561; Jones v. Marsh, Cas. temp. Talb. 64; Todd v. Hartley, 2 Met. (Ky.) 206; Eigleberger v. Kibler, 1 Hill Ch. 113; Sexton v. Wheaton, 8 Wheat. 229; Bank v. Housman, 6 Paige, 526; Cosby v. Ross, 3 J. J. Marsh. 290; Winebrenner v. Weisiger, 3 Mon. 32; Smith v. Greer, 3 Humph. 118; Ridgeway v. Underwood, 4 Wash. C. C. 129; Brewster v. Power, 10 Paige, 562; Baker v. Gilman, 52 Barb. 26; Reed v. Woodman, 4 Me. 400; Miller v. Miller, 23 Me. 22; Bangor v. Warren, 34 Me. 324; Bank v. Ennis, Wright, 605; Henderson v. Dodd, 1 Bailey Ch. 138; Curtis v. Fox, 47 N. Y. 299; Williams v. Davis, 69 Penn. 21; Pratt v. Myers, 56 Ill. 23; Goff v. Nuttall, 44 Penn. 78; Sanderson v. Streeter, 14 Kans. 458; Clark v. Killian, 103 U. S. 766; s. c. 3 MacArthur, 379; Lloyd v. Bunce, 41 Iowa, 660; Smith v. Vodges, 92 U. S. 183; s. c. 13 N. B. R. 433; Davidson v. Lanier, 51 Ala. 318; Spicer v. Ayers, 53 How. Pr. 405; Seaman v. Wall, 54 How. Pr. 47; Evans v. Lewis, 30 Ohio St. 11; Tuneson v. Chamblin, 88 Ill. 378; Kinghorn v. Wright, 45 N. Y. Sup. 615; Carr v. Breese, 81 N. Y. 584; Crawford v. Logan, 97 Ill. 396; Shackleford v. Todhunter, 4 Bradw. 271; Lockard v. Nash, 64 Ala. 365; Brown v. Vandermeulen, 44 Mich. 522; Spence v. Dunlap, 6 Lea. 457; Union Mutual Life Insurance Co. v. Spaids, 99 Ill. 249; Mutual Life Insurance Co. v. Sandfelder, 9 Mo. Ap. 285; Jackson v. Myers, 101 Ill. 550; *vide* Witherden v. Jumper, May on Fraud, 519; Peterson v. Williamson, 2 Dev. 326.

was actually received and paid. The extent and sufficiency of the consideration in reference to the value of the property is only material where the grantor is indebted at the time of the conveyance, and creditors are seeking to set aside the deed on the ground of fraud. But for the mere purpose of conveying the property by an instrument which is to operate under the statute of uses, it is sufficient if any consideration appears upon the face of the conveyance sufficient to raise the use, and neither the grantor nor his heirs are permitted to aver or prove that the consideration stated therein did not in fact exist. If such consideration is expressed so as to make a valid deed as against the grantor, it will also be valid against subsequent creditors.[1]

VOID AGAINST PRIOR CREDITORS.—Subsequent creditors may, however, impeach a voluntary conveyance by showing antecedent debts sufficient in amount to afford a reasonable evidence of a fraudulent intent.[2] The mere fact that the conveyance is voluntary does not raise a presumption of fraud in their favor, but they must prove the intent to delay, hinder, or defraud creditors.[3] When they, however, show an intent to defraud antecedent creditors, such proof is *prima facie* evidence of an intent to defraud subsequent creditors.[4] The true principle is, that a fraudulent intent against one or more creditors is fraudulent against

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[1] Bank of U. S. v. Housman, 6 Paige, 526.

[2] Mead v. Gregg, 12 Barb. 653; Richardson v. Rhodus, 14 Rich. 95; Huggins v. Perrine, 30 Ala. 396; Charlton v. Gardner, 11 Leigh, 281; Doyle v. Sleeper, 1 Dana, 531; Redfield v. Buck, 35 Conn. 328; Pawley v. Vogel, 42 Mo. 291.

[3] Hussey v. Castle, 41 Cal. 239.

[4] Horn v. Volcano Co., 13 Cal. 62; *vide* Harlan v. Maglaughlin, 90 Penn. 293.

all, and the statute justifies no other distinction between prior and subsequent creditors than that which arises from the necessity of showing a fraudulent intent against some creditor, which can not be done in behalf of creditors whose demands were not in existence at the time of the conveyance, but by proving either a prior indebtedness or a prospective fraud against them only.[1] Mere proof of indebtedness, however, is not conclusive. Whether a voluntary conveyance is fraudulent as to subsequent creditors is a question that is to be determined from all the circumstances of the transaction.[2] If the donor is insolvent at the time of the transfer, the conveyance is generally deemed to be void as to subsequent creditors.[3]

CONTINUOUS INDEBTEDNESS.—The general rule in regard to voluntary conveyances undoubtedly is that they are void only so far as may be necessary to satisfy prior creditors, and that if they are paid the conveyance will stand.[4] The mere fact, however, that the prior debts have been paid off will not alone render the transaction

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[1] Hutchinson v. Kelly, 1 Rob. 123; Thomson v. Dougherty, 12 S. & R. 448.

[2] Payne v. Stanton, 59 Mo. 158.

[3] Vertner v. Humphreys, 21 Miss. 130; Iley v. Niswanger, 1 McCord Ch. 518; s. c. 1 Harp. Ch. 295; Carpenter v. Roe, 10 N. Y. 224; Madden v. Day, 1 Bailey, 337, 587; Parrish v. Murphree, 13 How. 92; Beach v. White, Walk. Ch. 495; Hurdt v. Courtenay, 4 Met. (Ky.) 139; Lowry v. Fisher, 2 Bush, 70; Ridgeway v. Underwood, 4 Wash. C. C. 129; Partridge v. Stokes, 42 How. Pr. 381; s. c. 66 Barb. 586.

[4] Ingram v. Phillips, 3 Strobh. Ch. 565; O'Connor v. Bernard, 2 Jones, 654; Lyne v. Bank of Ky., 5 J. J. Marsh. 545; Sweny v. Ferguson, 2 Blackf. 129; Freeman v. Burnham, 36 Conn. 469; Abbott v. Tenney, 18 N. H. 109; Marsh v. Fuller, 18 N. H. 360; King v. Tharp, 26 Iowa, 283; Curtis v. Price, 12 Ves. 89; Pell v. Tredwell, 5 Wend. 661; Hudnal v. Wilder, 4 McCord, 294; s. c. 1 McCord, 227; Wilbur v. Fradenburgh, 52 Barb. 474; Webb v. Roff, 9 Ohio St. 430; Todd v. Hartley, 2 Met. (Ky.) 206; Converse v. Hartley, 31 Conn. 372; Claflin v. Mess, 30 N. J. Eq. 211.

valid, though it is entitled to great weight. A great deal will depend upon the mode in which such debts are paid. Paying off one debt by contracting another is not getting out of debt. Proving, therefore, that the prior debts have been paid off is doing nothing if in so doing the donor has contracted others to an equal amount,[1] and is not sufficient. *Ita demum revocatur quod fraudandorum creditorum causa factum est, si eventum fraus habuit; scilicet si hi creditores quorum fraudandorum causa fecit, bona ipsius vendiderunt, cæterum si illos dimisit quorum fraudandorum causa fecit, et alios sortitus est, si quidem simpliciter dimissis prioribus quos fraudare voluit, alios postea sortitus est, cessat revocatio: si autem horum pecunia quos fraudare noluit, priores dimisit quos fraudare voluit; Marcellus dicit revocationi locum fore. Secundum hanc distinctionem et ab imperatore Severo et Antonino rescriptum est eoque jure utimur.*[2] Such a continuous indebtedness has been justly compared to a stone descending a mountain covered with snow. Its bulk is increased every time it rolls over, but still, every added particle is referable to the stone originally put in motion as the cause of its adhesion to the aggregate mass.[3] In such instances the subsequent creditors are subrogated to the rights of the creditors whose debts their means have been used to pay.[4] Any

[1] Madden v. Day, 1 Bailey, 337, 587; Mills v. Morris, Hoffm. 419; Taylor v. Coenen, L. R. 1 Ch. Div. 636; Antrim v. Kelly, 4 N. B. R. 587.

[2] Dig. Lib. 42, tit. 9.

[3] Brown v. McDonald, 1 Hill Ch. 297.

[4] Richardson v. Smallwood, Jac. 552; s. c. 1 Cond. Ch. 262; Holmes v. Penney, 3 K. & J. 90; O'Connor v. Bernard, 2 Jones, 654; Mills v. Morris, Hoffm. 419; Savage v. Murphy, 34 N. Y. 508; s. c. 8 Bosw. 75; McElwee v. Sutton, 2 Bailey, 128; Churchill v. Wells, 7 Cold. 364; Madden v. Day, 1 Bailey, 337, 587; Brown v. M'Donald, 1 Hill Ch. 297; Wilson v. Buchanan, 7 Gratt. 334; Beach v. White, Walk. Ch. 495; Whittington v. Jennings, 6 Sim. 493; Newlin v. Garwood, 1 Whart. Dig. 572; Caston v. Cunningham, 3 Strobh. 59; Paulk v. Cooke, 39 Conn. 566.

other rule would simply permit the debtor to take the property of subsequent creditors and give it to his donee. The doctrine in regard to change of creditors, with a continuation of indebtedness, only applies, however, when the donor is insolvent at the time of the gift.[1] There must be something more than an extensive business whose balances are daily changing sides on his ledger.[2] The proof of prior debts must be specific,[3] and this proof must also be accompanied by evidence of the donor's inability to pay those debts.[4]

Remedies.—As there is no right without a remedy, it follows from the foregoing principles that subsequent creditors may institute proceedings to set aside a voluntary conveyance.[5] Whenever their rights depend upon the existence of prior debts, they must, however, show that there are such.[6] As a general rule, when a voluntary conveyance is set aside at the instance of prior creditors, subsequent creditors will participate in the fund [7]

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[1] Anon. 1 Wall. Jr. 107; Creed v. Lancaster Bank, 1 Ohio St. 1.

[2] Moritz v. Hoffman, 35 Ill. 553.

[3] Smith v. Greer, 3 Humph. 118; White v. Sansom, 3 Atk. 410.

[4] Loeschigk v. Hatfield, 5 Robt. 26; s. c. 4 Abb. Pr. (N. S.) 210; s. c. 51 N. Y. 660; Wilbur v. Fradenburgh, 52 Barb. 474; Hutchinson v. Kelly, 1 Rob. 123; Bank v. Patton, 1 Rob. 499.

[5] Thomson v. Dougherty, 12 S. & R. 448; Beach v. White, Walk. Ch. 495; Hurdt v. Courtenay, 4 Met. (Ky.) 139; Jenkyn v. Vaughan, 3 Drew. 419; s. c. 25 L. J. Ch. 338; Freeman v. Pope, L. R. 5 Ch. 538; s. c. L. R. 9 Eq. 206; Skarf v. Soulby, 1 Me. & G. 364; s. c. 1 H. & Tw. 426; s. c. 16 Sim. 344; s. c. 19 L. J. Ch. 30; Pratt v. Curtis, 6 N. B. R. 139; Chamley v. Dunsany, 2 Sch. & Lef. 689; *vide* Ede v. Knowles, 2 Y. & C. (N. S.) 172; Tripp v. Vincent, 3 Barb. Ch. 613.

[6] Lush v. Wilkinson, 5 Ves. 384; Holloway v. Millard, 1 Madd. 414; Manders v. Manders, 4 Ir. Eq. 434; Tripp v. Vincent, 3 Barb. Ch. 613; Kidney v. Coussmaker, 12 Ves. 136.

[7] Ammons' Appeal, 63 Penn. 284; Trimble v. Turner, 21 Miss. 348; Beach v. White, Walk. Ch. 495; Norton v. Norton, 59 Mass. 524; Botts

CONVEYANCE TO USE OF DEBTOR.—The statutes which make property conveyed to the use of the grantor liable to his debts are founded upon the principle that a man's property should pay his debts, although he has vested a nominal title in some one else. For that purpose they declare the title to be in the grantor, and no transfer which is entirely nominal can stand in the way. The simple inquiry is whether the property belongs to the debtor, not upon any theory of fraud and against the terms of the conveyance, but upon a theory of equitable title reserved to the grantor by the very terms of the conveyance, which transfers the legal and nominal title to another. Property so held in trust for the grantor is liable to subsequent as well as prior creditors.[1] A conveyance to the use of the grantor during his life with power to dispose of it by will, or direct its course after his death, is a conveyance to his use, and the property so conveyed is liable to those who deal with him after its execution. A man can not be the equitable owner of property and still have it exempt from his debts.[2] A power of revocation inserted in a

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v. Cozine, Hoffm. 79; Churchill v. Wells, 7 Cold. 364; Kidney v. Coussmaker, 12 Ves. 136, note; Iley v. Niswanger, 1 McCord Ch. 518; s. c. 1 Harp. Ch. 295; Hargroves v. Meray, 2 Hill Ch. 222; Kipp v. Hanna, 2 Bland, 26; Thomson v. Dougherty, 12 S. & R. 448; Richardson v. Smallwood, Jac. 552; s. c. 1 Cond. Ch. 262; St. Armand v. Barbara, Comyn. 255; O'Connor v. Bernard, 2 Jones, 654; Kehr v. Smith, 20 Wall. 31; s. c. 2 Dill. 50; s. c. 7 N. B. R. 97; s. c. 10 N. B. R. 49. *Contra*, Williams v. Banks, 11 Md. 198; s. c. 19 Md. 22; Ward v. Hollins, 14 Md. 158; *vide* Converse v. Hartley, 31 Conn. 372; Todd v. Hartley, 2 Met. (Ky.) 206.

[1] Curtis v. Leavitt, 15 N. Y. 9; s. c. 17 Barb. 309.

[2] Mackason's Appeal, 42 Penn. 330; Brinton v. Hook, 3 Md. Ch. 477; Ford v. Caldwell, 3 Hill (S. C.) 248; Coolidge v. Melvin, 42 N. H. 510; Hunters v. Waite, 3 Gratt. 26; Watts v. Thomas, 2 P. Wms. 364; Casey's Trusts, 4 Ir. Ch. 247; *In re* Pearson, L. R. 3 Ch. Div. 807.

deed will not render the property liable to subsequent creditors.[1]

Discretion of Trustee.—A deed, however, is not fraudulent against subsequent creditors from the fact that it contains a trust to apply the interest of the property in such manner as the trustee in his discretion may think fit towards the benefit of the grantor, or his wife or his children. If the grantor parts *bona fide* by the deed with all control over the property, and vests it in the trustee in order to give him the absolute power to deal with it as he pleases for the benefit of himself or his wife or his children, it is not fraudulent against subsequent creditors any more than if it were a conveyance simply for the benefit of the wife and children of the grantor. The mere fact that the grantor may possibly derive some benefit under it will not render it fraudulent. If, however, there is any secret trust for the benefit of the grantor, the deed will be fraudulent under the statute.[2]

Colorable Transfers.—If a conveyance is merely colorable, and a secret trust and confidence exist for the benefit of the grantor, it is void not only against precedent but subsequent creditors, for it is in such a case a continuing fraud, and may actually operate as such as well in reference to debts contracted after as before the conveyance. Property conveyed in trust is still the property of the grantor for every beneficial purpose, and the secret trust in a conveyance tainted with actual fraud renders

[1] Jones v. Clifton, 101 U. S. 225; s. c. 18 N. B. R. 125; *vide* Tarback v. Marbury, 2 Vern. 510.

[2] Holmes v. Penney, 3 K. & J. 90.

the property liable to subsequent creditors.[1] A discrimination, however, must be made between the different kinds of fraudulent conveyances and the different degrees and shades of fraud in each. For some a valuable and adequate consideration is paid, yet they are made with a view to aid the debtor to convert his property into that which can not be attached or levied upon, and so to aid him in placing it beyond the reach of creditors. Such conveyances will, in general, be good against subsequent creditors, for there is no secret trust for the benefit of the vendor.[2] The purpose or effect of a conveyance must, in general, be to injure subsequent creditors in order to render it void as to them. The question is generally one of fact. A conveyance can only be valid as to them when they are not intended or liable to be delayed, hindered, or

[1] Clark v. French, 23 Me. 221; Whitmore v. Woodward, 28 Me. 392; Damon v. Bryant, 19 Mass. 411; McLane v. Johnson, 43 Vt. 48; King v. Wilcox, 11 Paige, 589; Henry v. Fullerton, 21 Miss. 631; Hargroves v. Meray, 2 Hill Ch. 222; Marston v. Marston, 54 Me. 476; Parkman v. Welch, 36 Mass. 231; McConihe v. Sawyer, 12 N. H. 396; Ladd v. Wiggin, 35 N. H. 421; Gove v. Lawrence, 26 N. H. 484; Wadsworth v. Havens, 3 Wend. 411; Smith v. Espy, 9 N. J. Eq. 160; Flynn v. Williams, 1 Ired. 509; s. c. 7 Ired. 32; Smith v. Lowell, 6 N. H. 67; Smyth v. Carlisle, 16 N. H. 417; s. c. 17 N. H. 417; Dart v. Stewart, 17 Ind. 221; Livermore v. Boutelle, 77 Mass. 217; Hook v. Mowre, 17 Iowa, 195; Ruffing v. Tilton, 12 Ind. 259; Ward v. Enders, 29 Ill. 519; Davis v. Stern, 15 La. An. 177; King v. Wilcox, 11 Paige, 589; Pennington v. Clifton, 11 Ind. 162; Herschfeldt v. George, 6 Mich. 456; Merrill v. Meachum, 5 Day, 341; Lewis v. Love, 2 B. Mon. 345; Carlton v. King, 1 Stew. & Port. 472; Williams v. Avery, 38 Ala. 115; Pratt v. Cox, 22 Gratt. 330; Partridge v. Stokes, 66 Barb. 586; s. c. 44 How. Pr. 381; Day v. Cooley, 118 Mass. 524; Dewey v. Moyer, 16 N. Y. Supr. 473; Jones v. King, 86 Ill. 225; Allaire v. Day, 30 N. J. Eq. 232; U. S. v. Griswold, 8 Fed. Rep. 556; *vide* Stone v. Myers, 9 Minn. 303; Summers v. Roos, 42 Miss. 749; Kane v. Roberts, 40 Md. 590.

[2] Clark v. French, 23 Me. 221; O'Connor v. Bernard, 2 Jones, 654; Hall v. Sands, 52 Me. 355; Lynch v. Raleigh, 3 Ind. 273; Upton v. Craig, 57 Ill. 257; Sanders v. Chandler, 26 Minn. 273.

defrauded by it.[1] If the creditor had notice of the conveyance at the time the debt was contracted, the conveyance will be valid as to him.[2] When a transfer is rendered fraudulent by the retention of possession, it is also void as to them, for they are deceived by the false appearance of wealth, and thereby induced to give the vendor credit.[3]

Representations. — If a creditor contracts a debt upon the faith of a statement made by the grantee that the grantor still retains his interest in the property, he is entitled to be paid out of it.[4]

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[1] Hall v. Sands, 52 Me. 355; Keeler v. Ullrich, 32 Mich. 88.

[2] Monroe v. Smith, 79 Penn. 459; Baker v. Gilman, 52 Barb. 26; Kane v. Roberts, 40 Md. 590; Chrisman v. Graham, 51 Tex. 454; Kirksey v. Snedecor, 60 Ala. 192; Herring v. Richards, 3 Fed. Rep. 439; Sheppard v. Thomas, 24 Kans. 780; Sledge v. Obenchain, 58 Miss. 670.

[3] Clow v. Woods, 5 S. & R. 275; Young v. Pate, 4 Yerg. 164; Smith v. Lowell, 6 N. H. 67; Paul v. Crooker, 8 N. H. 288; Woodrow v. Davis, 2 B. Mon. 296; Rankin v. Holloway, 11 Miss. 614; Smith v. McDonald, 25 Geo. 377; Arrowsmith v. O'Sullivan, 44 N. Y. Sup. 554.

[4] Mowry's Appeal, 94 Penn. 376.

CHAPTER XIV.

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

Modern Device.—Assignments for the benefit of creditors are for the most part an American device, and are of a comparatively modern origin.[1] It is true that deeds of composition have been used for a long time, but there is a manifest distinction between the two instruments. An assignment is a transfer by a debtor of the whole or a part of his effects to some person in trust to pay his creditors. A composition is a contract between a debtor and one or more of his creditors, by which it is agreed that the debtor shall be discharged on his transfer to such creditor or creditors of certain stipulated effects to be held by them absolutely. A mere glance at these definitions will show an essential distinction between the two transactions. An assignment is the voluntary act of the debtor. The creditors need not be consulted, nor need they be parties to it. A composition is necessarily the result of a treaty with the creditors severally, however many may join in the same writing, and the creditors are parties to it.[2]

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[1] In Grover v. Wakeman, 11 Wend. 187; s. c. 4 Paige. 23; Senator Tracy says that he can find no trace of their distinct recognition in the English courts prior to 1805; but Bamford v. Baron, 2 T. R. 594, note, is before that date.

[2] Wiener v. Davis, 18 Penn. 331; Grover v. Wakeman, 11 Wend. 187, per Senator Tracy; Robbins v. Magee, 76 Ind. 381.

DEEDS OF TRUST.—There is also a distinction between an assignment and a deed of trust in the nature of a mortgage. The former is an absolute and indefeasible conveyance of the subject-matter thereof for the purposes expressed therein; the latter is conditional and defeasible. By the former the grantor parts absolutely with the title, which vests in the trustee unconditionally for the purposes of the trust; the latter is a conveyance in trust for the purpose of securing a debt with a condition of defeasance. The former is a conveyance to a trustee for the purpose of raising a fund to pay the debts of creditors generally, or a certain class of creditors; the latter is a conveyance to secure the payment of a certain debt specified therein. The former conveys the property absolutely to a trustee to be sold for the payment of the debts named in it; the latter purports to be a security for a debt with power to sell if the debt shall not be paid when due.[1] There is also a distinction between an assignment and a mere deed of trust. The former is executed for the benefit of creditors generally, or of a certain class of creditors; the latter is executed for the benefit of some particular creditor whose debt is specified therein. In one class the object is to gain time for the debtor by agreement with the creditor; in the other the debtor offers his property to his creditors for distribution, with such priorities as he may prescribe.[2]

SOLVENT DEBTOR.—A voluntary deed of trust by a solvent debtor must not, moreover, be confounded with

[1] State v. Benoist, 37 Mo. 500; Crow v. Beardsley, 68 Mo. 435; Hoffman v. Mackall, 5 Ohio St. 124; Stewart v. Kerrison, 3 Rich. (N. S.) 266.

[2] State Bank v. Chapelle, 40 Mich. 447; Green v. Trieber, 3 Md. 11; Fouke v. Fleming, 13 Md. 392.

an assignment by an insolvent debtor for the benefit of all or particular creditors.[1] It differs from a mortgage executed concurrently with the creation or extension of a debt because it is voluntary, and from an assignment by an insolvent debtor in view of his insolvency because it is the act of a solvent man. Such a deed of trust does not differ materially from a mortgage.[2] When it does not appear from the face of the deed that the grantor owes any debts besides those which he provides for, no inference can arise that it is made with the intent to delay, hinder or defraud creditors, for where there are no creditors there can be no intention to defraud them.[3] But when the deed on its face purports to be made by a solvent debtor, proof may be given of his insolvency, and, if that is established, it will then be governed by the same principles as if the insolvency appeared on its face.[4]

General and Partial.—Assignments for the benefit of creditors are commonly called voluntary assignments, to distinguish them from such as are made by the compulsion of the law.[5] There are two kinds of assignments, styled respectively general and partial. An assignment which conveys all the property of the debtor is a general assignment. One which conveys only a part of the property of the debtor is a partial assignment.[6] One of the

[1] Hodge v. Wyatt, 10 Ala. 271; Elmes v. Sutherland, 7 Ala. 262; Pope v. Wilson, 7 Ala. 690; Dubose v. Dubose. 7 Ala. 235; Graham v. Lockhart, 8 Ala. 9; Frow v. Smith, 10 Ala. 571; Fouke v. Fleming, 13 Md. 392; Hardy v. Skinner, 9 Ired. 191.

[2] Elmes v. Sutherland, 7 Ala. 262; Green v. Banks, 24 Tex. 508.

[3] Pope v. Wilson, 7 Ala. 690.

[4] Hardy v. Skinner, 9 Ired. 191; Hardy v. Simpson, 13 Ired. 132; Green v. Banks, 24 Tex. 508.

[5] Manny v. Logan, 27 Mo. 528.

[6] Stetson v. Miller, 36 Ala. 642; Mussey v. Noyes, 26 Vt. 462; Noyes v. Hickok, 27 Vt. 36; Shapleigh v. Baird, 26 Mo. 322; Manny v. Logan, 31 Mo. 91; Lampson v. Arnold, 17 Iowa, 479.

primary and essential elements of an assignment is the transfer of the title and interest of the debtor in the property assigned.[1] The property must also be conveyed to an assignee, to be held by him in trust for creditors.[2] If either of these essentials is wanting, the transaction is not an assignment for the benefit of creditors.[3]

CREDITORS NOT PARTIES.—To the creation of a trust by deed in favor of any person, it is not necessary that the *cestui que trust* should either be a party or assent to it. It is clear that trusts may lawfully be created where there can be no present assent, for they may be in favor of persons not in existence. It is sufficient in general that in such cases there is a competent grantor to convey and a competent grantee to take the property. As to trusts created for the benefit of creditors, and to which they are not, technically speaking, parties, if *bona fide* made, they are unquestionably valid, and pass a legal estate to the trustee. The sole question that can arise, independent of the bankrupt law, is whether the conveyance is *bona fide* or fraudulent.[4] It is not necessary that the deed shall be executed by the *cestuis que trust* in order to give validity to its provisions. The instant the legal title becomes

[1] Banning v. Sibley, 3 Minn. 389.

[2] Peck v. Merrill, 26 Vt. 686; Mussey v. Noyes, 26 Vt. 462.

[3] Beans v. Bullitt, 57 Penn. 221.

[4] Halsey v. Whitney, 4 Mason, 206; Nicoll v. Mumford, 4 Johns. Ch. 522; Houston v. Nowland, 7 G. & J. 480; Cunningham v. Freeborn, 11 Wend. 241; s. c. 3 Paige, 537; s. c. 1 Edw. 256; Marbury v. Brooks, 7 Wheat. 556; s. c. 11 Wheat. 78; Pope v. Brandon, 2 Stew. 401; Hempstead v. Johnson, 18 Ark. 123; Layson v. Rowan, 7 Rob. (La.) 1; Reinhard v. Bank of Ky., 6 B. Mon. 252; Jones v. Dougherty, 10 Geo. 273; Robinson v. Rapelye, 2 Stew. 86; Brown v. Minturn, 2 Gall. 557; Wheeler v. Sumner, 4 Mason, 183; Duvall v. Raisin, 7 Mo. 449; Skipwith v. Cunningham, 8 Leigh, 271; U. S. Bank v. Huth, 4 B. Mon. 423; Repplier v. Buck, 5 B. Mon. 96; Hall v. Dennison, 17 Vt. 310.

vested in the assignee a trust arises in behalf of those in whose favor it is declared, provided there is a sufficient consideration to sustain it.[1]

CONSIDERATION.—A nominal consideration is sufficient

[1] Skipwith v. Cunningham, 8 Leigh, 271. The common law doctrine in Maine, Massachusetts and New Hampshire was different. An assignment was not valid without the assent of the creditors. An attachment made before such assent was given was entitled to priority. Widgery v. Haskell, 5 Mass. 144; Hooper v. Hills, 26 Mass. 435; Marston v. Coburn, 17 Mass. 454; Russell v. Woodward, 27 Mass. 408; Viall v. Bliss, 26 Mass. 13; Edwards v. Mitchell, 67 Mass. 239; Wiley v. Collins, 11 Me. 193; Carr v. Dole, 17 Me. 358; Leeds v. Sayward, 6 N. H. 83; Swan v. Crafts, 124 Mass. 453. With the assent of the creditors an assignment could be made. Stevens v. Bell, 6 Mass. 339; Collins v. Wiley, 11 Me. 193; Boyden v. Moore, 28 Mass. 362. When made without the assent of the creditors, it was valid as to those that did assent subsequently. Hastings v. Baldwin, 17 Mass. 552; Harris v. Sumner, 19 Mass. 129; Foster v. Saco Manuf. Co., 29 Mass. 451; Lupton v. Cutter, 25 Mass. 298; Nostrand v. Atwood, 36 Mass. 281; Everett v. Walcott, 32 Mass. 94; Beach v. Viles, 2 Pet. 675; Gore v. Glisby, 25 Mass. 555; Sadler v. Immel, 15 Nev. 265. An attachment was entitled to priority over creditors who subsequently assented. Ward v. Lamson, 23 Mass. 358; Bradford v. Tappan, 28 Mass. 76; Leeds v. Sayward, 6 N. H. 83; Denie v. Hart, 19 Mass. 204; Copeland v. Weld, 8 Me. 411. The burden of proof was on the assignee to show the existence of the debts, Russell v. Woodward, 27 Mass. 408, and that the property was needed to satisfy the demands of those who had assented. Borden v. Sumner, 21 Mass. 265; Widgery v. Haskell, 5 Mass. 144. It was not necessary that the assent should be in writing. Wiley v. Collins, 11 Me. 193. An assignment could not be made by a deed poll. Boyden v. Moore, 28 Mass. 362; Brewer v. Pitkin, 28 Mass. 292. The law did not give any preference to an attachment or an assignment, and would not marshal the assets to aid either. Gore v. Clisby, 25 Mass. 555; Lupton v. Cutter, 25 Mass. 298; Copeland v. Weld, 8 Me. 411. Under the present statutes of Maine and New Hampshire, an assignment is valid against a subsequent attachment, although the creditors have not assented. Fiske v. Carr, 20 Me. 301; Fellows v. Greenleaf, 43 N. H. 421. The same rule prevailed under the statute of Massachusetts, Shattuck v. Freeman, 42 Mass. 10, but assignments are now void under the insolvent laws of that State. Stanfield v. Simmons, 78 Mass. 442. *Contra*, Adams v. Blodgett, 2 Woodb. & Min. 233.

to support the use.[1] If a consideration of money is expressed in the assignment, no averment or evidence can be received to the contrary.[2] The relation of debtor and creditor between the assignor and assignee,[3] and the undertaking on the part of the assignee to pay the proceeds of the estate to the creditors of the assignor,[4] are a sufficient valuable consideration. The real consideration is the debts due to the creditors, and these constitute a valuable consideration in the highest sense of the term,[5] and relieve the assignment from the imputation of fraud that would result from a naked gift.[6]

PRESUMPTION OF ASSENT.—The creditors may reject the beneficiary interest given to them by the assignment, and if they do it falls to the ground and becomes a resulting trust for the debtor. But if the trust is for their benefit, the law presumes their assent to it until the contrary is shown.[7] Whether the beneficiaries in the trust

[1] Cunningham v. Freeborn, 11 Wend. 241; s. c. 1 Edw. 256; 3 Paige, 537; U. S. Bank v. Huth, 4 B. Mon. 423; Repplier v. Buck, 5 B. Mon. 96; Hall v. Dennison, 17 Vt. 310; Jones v. Dougherty, 10 Geo. 273. *Contra*, M'Kinley v. Combs, 1 Mon. 105.

[2] Wilt v. Franklin, 1 Binn. 502.

[3] Cunningham v. Freeborn, 11 Wend. 241; s. c. 1 Edw. 256; 3 Paige, 537; Ward v. Trotter, 3 Mon. 1; Jones v. Dougherty, 10 Geo. 273.

[4] Wilt v. Franklin, 1 Binn. 502; Halsey v. Whitney, 4 Mason, 206; Haven v. Richardson, 5 N. H. 113; U. S. Bank v. Huth, 4 B. Mon. 423; Hall v. Dennison, 17 Vt. 310; Petrikin v. Davis, Morris, 296; Fermester v. McRohrie, 12 Ired. 287; Gates v. Labeaume, 19 Mo. 17.

[5] Halsey v. Whitney, 4 Mason, 206; U. S. Bank v. Huth, 4 B. Mon. 423; Hudson v. Maze, 4 Ill. 578; Hall v. Dennison, 17 Vt. 310; Laurence v. Davis, 3 McLean, 177; Meeker v. Saunders, 6 Iowa, 61; Stephenson v. Hayward, Prec. Ch. 310; Hollister v. Loud, 2 Mich. 309; Gates v. Labeaume, 19 Mo. 17.

[6] U. S. Bank v. Huth, 4 B. Mon. 423; Hollister v. Loud, 2 Mich. 309.

[7] Halsey v. Whitney, 4 Mason, 206; Wheeler v. Sumner, 4 Mason, 183; Abercrombie v. Bradford, 16 Ala. 560; Farquharson v. McDonald, 2 Heisk.

deed are apprised of the conveyance or not is not material. When it comes to their knowledge they are entitled to accept or reject its provisions.[1] An express avowal of that assent is not necessary to the operation of the assignment,[2] for the deed is complete when executed by the parties to it.[3] If an assent is expressly given, it operates retroactively to confirm the conveyance *ab initio*.[4] Even without such assent the assignment will prevail over a subsequent execution or attachment.[5] If one *cestui que trust* renounces the trust, then it either enures solely to the benefit of the rest, or if there are no others, it results to the debtor. But until the renunciation is made, or implied from circumstances, the trust continues. It arises without any act on the part of the *cestuis que trust*, and in many instances they may know nothing of it until some time after the date of its creation. The deed, however, is good and available on the instant of its execution, and can only be avoided by the dissent, express or implied, of the *cestuis que trust*.[6] The doctrine of implied assent, however, is limited to those cases where there is a reason-

404; England v. Reynolds, 38 Ala. 370; Hyde v. Olds, 12 Ohio St. 591; Price v. Parker, 11 Iowa, 144; Fellows v. Greenleaf, 43 N. H. 421; Brown v. Lyon, 17 Ala. 659; Rankin v. Lodor, 21 Ala. 380; Lanier v. Driver, 24 Ala. 149; Gale v. Mensing, 20 Mo. 461; Sadlier v. Fallon, 4 R. I. 490; U. S. v. Bank of U. S., 8 Rob. (La.) 262; Forbes v. Scannell, 13 Cal. 242; Tompkins v. Wheeler, 16 Pet. 106. *Contra*, Naylor v. Fosdick, 4 Day, 146; Brown v. Burrell, 1 Root, 252; Widgery v. Haskell, 5 Mass. 144; Leeds v. Sayward, 6 N. H. 83; Edwards v. Mitchell, 67 Mass. 239; Waters v. Comly, 3 Harring. 117. In England each case is governed by its own circumstances. Smith v. Hurst, 10 Hare, 30; s. c. 15 E. L. & Eq. 520; 17 Jur. 30; 22 L. J. Ch. (N. S.) 289.

[1] Furman v. Fisher, 4 Cold. 626.

[2] Nicoll v. Mumford, 4 Johns. Ch. 522.

[3] Brooks v. Marbury, 1 Wheat. 78.

[4] Halsey v. Whitney, 4 Mason, 206. [5] Rankin v. Lodor, 21 Ala. 380.

[6] Skipwith v. Cunningham, 8 Leigh, 271.

able presumption of such assent, and does not apply to any deed which does not appear to be for the benefit of the creditors.[1] This presumption is not founded on the face of the instrument, but in the nature and circumstances of the entire case.[2]

EFFECT OF REQUIREMENT THAT CREDITORS SHALL SIGN. The assignment not only need not, but should not, contain any provision for the creditors to sign it or become parties to it.[3] When it expressly excludes all implied assent, by requiring that the creditors shall manifest their consent in a prescribed mode,[4] or by stipulating for the sanction of a majority of the creditors, before it can take effect,[5] there can be no presumption of assent. When the provision is for those who execute it within a certain time, the creditors can only claim a benefit under it by executing it within that time.[6] The mere omission to sign the deed will not make the deed void unless there is some express requirement to that effect.[7]

WHEN ASSENT NOT PRESUMED.—The presumption that the creditors assent to an assignment is based on the principle that every man may be presumed to assent to an act which is for his benefit. But in order that this presumption may arise, the assignment must, on its face, plainly and clearly appear to be for their benefit. Where there

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[1] Smith v. Leavitts, 10 Ala. 92; Lockhart v. Wyatt, 10 Ala. 231.

[2] Stewart v. Spencer, 1 Curt. 157.

[3] Fellows v. Greenleaf, 43 N. H. 421.

[4] Todd v. Bucknam, 11 Me. 41; Swearinger v. Slicer, 5 Mo. 241; Moore v. M'Duffy, 3 Hawks, 578.

[5] Laurence v. Davis, 3 McLean, 177; Shearer v. Loftin, 26 Ala. 703.

[6] Brown v. Lyon, 17 Ala. 659.

[7] Fellows v. Greenleaf, 43 N. H. 421; Gale v. Mensing, 20 Mo. 461.

are conditions in the assignment, as, for instance, that the creditors shall release their debts, the presumption of assent does not arise, because it involves a question of discretion upon which different minds may draw different conclusions. If, therefore, an assent on the part of creditors is necessary to give full effect to such an assignment, it is not complete until such assent is expressly given.[1] If the assignment does not devote the property absolutely and under all circumstances to the payment of debts, the assent of creditors is not presumed.[2] There is no presumption of assent if the assignment is fraudulent, either in law or in fact.[3] No assent, therefore, can be presumed when the assignment requires that the creditors shall give to the debtor a credit for the balance that remains due after the proceeds are distributed,[4] or where the majority of the creditors are to have the power to fix the time for the sale of the property,[5] or where the assignee is disqualified,[6] or where the liability of the assignee is limited to actual receipts or wilful defaults,[7] or where the assignees are not to be responsible for the neglect of each other.[8] There is also a distinction between an assignment by an

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[1] Halsey v. Whitney, 4 Mason, 206; Drake v. Rogers, 6 Mo. 317; Hurd v. Silsbee, 10 N. H. 108; *vide* Skipwith v. Cunningham, 8 Leigh, 271; Hall v. Dennison, 17 Vt. 310; Sadlier v. Fallon, 4 R. I. 490. Upon this subject the law varies with each State according to whether it upholds or avoids assignments exacting releases.

[2] Kalkman v. McElderry, 16 Md. 56.

[3] Townsend v. Harwell, 18 Ala. 301; Stewart v. Spencer, 1 Curt. 157; Ashley v. Robinson, 29 Ala. 112; Benning v. Nelson, 23 Ala. 801; Baldwin v. Peet, 22 Tex. 708.

[4] Todd v. Bucknam, 11 Me. 41; Elmes v. Sutherland, 7 Ala. 262.

[5] Shearer v. Loftin, 26 Ala. 703.

[6] Spinney v. Portsmouth Co., 25 N. H. 9.

[7] Brown v. Warren, 43 N. H. 430; Spinney v. Portsmouth Co., 25 N. H. 9.

[8] Spinney v. Portsmouth Co., 25 N. H. 9.

insolvent debtor and a deed of trust by a solvent debtor.[1] If the latter postpones the time for payment beyond the time when the debts become due, or involves any risk of the destruction or deterioration of the property, no presumption of assent will arise.[2]

DISSENT.—The doctrine of implied assent is for the benefit of the creditors, and they may, if they think proper, decline to avail themselves of it;[3] and this may be done by any distinct and unequivocal act of renunciation.[4] Those who assail the assignment on the ground that the creditors have not accepted it, must repel the presumption of assent by proof of disclaimer or abandonment on the part of the creditors provided for.[5]

EFFECT OF REFUSAL.—The refusal of one or more creditors to accept does not render the deed invalid as to other creditors who desire to claim a benefit under it. If valid in other respects the assignment is a security for them, notwithstanding the refusal of one or more of the creditors to accept it. The effect of a refusal by a creditor to take under the deed is the same as if he had been omitted.[6] The distinction is between a deed which con-

[1] Elmes v. Sutherland, 7 Ala. 262; Hodge v. Wyatt, 10 Ala. 271; Pope v. Wilson, 7 Ala. 690; Dubose v. Dubose, 7 Ala. 235; Graham v. Lockhart, 8 Ala. 9.

[2] Hodge v. Wyatt, 10 Ala. 271; Elmes v. Sutherland, 7 Ala. 262; Evans v. Lamar, 21 Ala. 333; Kemp v. Porter, 7 Ala. 138; Graham v. Lockhart, 8 Ala. 9; Shearer v. Loftin, 26 Ala. 703.

[3] Smith v. Leavitts, 10 Ala. 92.

[4] Farquharson v. McDonald, 2 Heisk. 404.

[5] U. S. Bank v. Huth, 4 B. Mon. 423; Moffatt v. Ingham, 7 Dana, 495.

[6] Smith v. Leavitts, 10 Ala. 92; Halsey v. Whitney, 4 Mason, 206; Hastings v. Baldwin, 17 Mass. 552; Gordon v. Coolidge, 1 Sumner, 537; Petrikin v. Davis, Morris, 296; Kinnard v. Thompson, 12 Ala. 487.

templates or needs the assent of all the creditors before it can become complete or valid, and a deed which does not require the consent of all. In the latter case the assent of a part only will make it valid as far as it respects them.[1] In the former case, inasmuch as there can be no presumption of assent, the deed is within the general rule of mandates, that until the persons for whose benefit they are made signify their assent they are revocable by the grantor. In such case the levy of an execution prior to the consent of all is equivalent, so far as the execution creditor is concerned, to a revocation by the debtor.[2] This doctrine applies to all cases where the presumption of assent does not arise.

IRREVOCABLE.—The debtor can not revoke the assignment, nor can he even extinguish it by getting a reconveyance, for no act of the assignee can affect the rights of the *cestuis que trust*.[3] The assignment, however, is revocable

[1] Mauldin v. Armitstead, 14 Ala. 702; Brown v. Lyon, 17 Ala. 659.

[2] Lockhart v. Wyatt, 10 Ala. 231; Hodge v. Wyatt, 10 Ala. 231; Elmes v. Sutherland, 7 Ala. 262; Shearer v. Loftin, 26 Ala. 703.

[3] Furman v. Fisher, 4 Cold. 626; Hyde v. Olds, 12 Ohio St. 591; Ingram v. Kirkpatrick, 6 Ired. Eq. 462; Forbes v. Scannell, 13 Cal. 242; Brown v. Chamberlain, 9 Fla. 464; Hall v. Dennison, 17 Vt. 310; Stewart v. Hall, 3 B. Mon. 218; *ex parte* Conway, 12 Ark. 302; Skipwith v. Cunningham, 8 Leigh, 271; Sheldon v. Smith, 28 Barb. 593. *Contra*, Pitts v. Viley, 4 Bibb. 446; M'Kinley v. Combs, 1 Mon. 105; Langton v. Tracey, 1 Nels. 126; s. c. 2 Ch. Rep. 30; Galt v. Dibrell, 10 Yerg. 146; Brevard v. Neely, 2 Sneed, 164. The doctrine in England is that an assignment is revocable. Gerrard v. Lauderdale, 3 Sim. 1; Page v. Broom, 4 Russ. 6; Acton v. Woodgate, 2 M. & K. 492; Griffith v. Ricketts, 7 Hare, 299; Smith v. Hurst, 10 Hare, 30; s. c. 15 Eng. L. & Eq. 520; s. c. 17 Jur. 30; s. c. 22 L. J. Ch. (N. S.) 289; Law v. Bagwell, 4 Dr. & War. 398; Brown v. Cavandish, 1 J. & L. 606; Gibbs v. Glamis, 11 Sim. 584; Ravenshaw v. Collier, 7 Sim. 3; Simmonds v. Palles, 2 J. & L. 489; Walwyn v. Couts, 3 Sim. 14; s. c. 3 Mer. 707. The deed is not revocable after such communications as will give the creditors an interest in it. Griffith v.

when the creditors refuse to accept,[1] or when they delay for so long a time as to create a counter presumption to rebut the presumption of assent.[2] In either of these cases it may be altered, cancelled, or changed by the parties to it.

PARTIES MAY ALTER A FRAUDULENT ASSIGNMENT.—An assignment which is fraudulent on its face is binding on those who assent to it,[3] and consequently the debtor alone can not change or modify the terms of the transfer in any respect.[4] It is different, however, when the parties consent to a change. The distinction between void and voidable must be regarded. A deed or instrument utterly void is one that never existed. It passes nothing, confers no right or title upon the party named as grantee, and is of no effect as between the immediate parties to it. An instrument or deed fraudulent as to creditors and voidable by them is nevertheless valid as between the parties to it, and the title is deemed to have passed and vested in the grantee. A deed which is fraudulent under the statute is

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Ricketts, 7 Hare, 299; Acton v. Woodgate, 2 M. & K. 492; Harland v. Binks, 15 A. & E. (N. S.) 713; s. c. 69 E. C. L. 713. Nor when there is a covenant not to revoke. Griffith v. Ricketts, 7 Hare, 299. Nor after the payment of an instalment. Kirwan v. Daniel, 5 Hare, 493. The trustee upon revocation may retain for his own debt. Wilding v. Richards, 1 Coll. 655; Griffith v. Ricketts, 7 Hare, 299; Siggers v. Evans, 32 Eng. L. & Eq. 139.

[1] Gibson v. Chedie, 1 Nev. 497; Gibson v. Rees, 50 Ill. 383.

[2] Gibson v. Rees, 50 Ill. 383.

[3] Hone v. Henriquez, 13 Wend. 240; s. c. 2 Edw. 120; Van Winkle v. McKee, 7 Mo. 435; Johns v. Bolton, 12 Penn. 339; Geisse v. Beal, 3 Wis. 367; Bellamy v. Bellamy, 6 Fla. 62; Richardson v. Rogers, 45 Mich. 591.

[4] Porter v. Williams, 9 N. Y. 142; s. c. 12 How. Pr. 107; Sheldon v. Smith, 28 Barb. 593; Metcalf v. Van Brunt, 37 Barb. 621.

voidable only and not absolutely void.[1] A void deed is incapable of confirmation or of being made good by any subsequent act of the party, while one which is merely voidable may be confirmed, and will then be effectual for all purposes unless the rights of third persons intervene and prevent it.

PARTIES TO AN ALTERATION.—The validity of an assignment always depends upon the presumed assent of the creditors who are provided for by its terms, and when the assignment is fraudulent there is no such presumption. The assignment then belongs to a class of instruments which are revocable until all the creditors have assented, and may be cancelled, abrogated, or modified at pleasure by those who are parties to it.[2] But the only persons who need to unite in such a cancellation or reformation of the instrument are those who have in fact become parties to it. The title of the assignee is good in the first instance until the creditors take measures to impeach and avoid the instrument, and the creditors for whom no provision is made in the assignment, or who have not become parties to it, can not complain of the cancellation or modification, for no trust results in their favor.[3] No alteration or revocation, however, can prejudice the rights of a creditor who has obtained a valid lien upon the property.[4]

MODE OF ALTERATION.—It is immaterial in what form the alteration may be made, whether by a reconveyance

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[1] Hone v. Woolsey, 2 Edw. 289.

[2] Insurance Co. v. Wallis, 23 Md. 173.

[3] Hone v. Woolsey, 2 Edw. 289.

[4] Porter v. Williams, 9 N. Y. 142; s. c. 12 How. Pr. 107; Gates v. Andrews, 37 N. Y. 657.

back to the debtor and a reassignment by him, or by another assignment without a reconveyance,[1] or by an instrument reiterating the trusts and dispensing with the provisions which make the assignment void.[2] The law looks to the object and intent of the parties, and gives effect to their acts so as to carry such intention into effect wherever it is fair and honest. There must, however, in all cases be an abandonment of the fraudulent deed. The assignee can not take a good security and yet avail himself of that which is vicious, much less can he make the new security a means of sustaining that which is illegal.[3] Therefore one void deed can not be made good by another void deed, nor can the two be construed together as one instrument.[4] A deed of appointment under a power reserved in the assignment can not have any more validity than the assignment itself, for it can not be supported and carried into effect while the assignment is set aside.[5]

FORM.—No particular form of words or instrument is necessary to constitute a valid assignment of chattels or *choses in action*. Any valid transfer by which the uses

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[1] Brahe v. Eldridge, 17 Wis. 184; Bridges v. Hindes, 16 Md. 101; Sumner v. Hicks, 2 Black. 532; Ingraham v. Wheeler, 6 Conn. 277; Mills v. Argall, 6 Paige, 577; Pierce v. Brewster, 32 Ill. 268; Overton v. Holinshade, 5 Heisk. 283; First Nat'l Bank v. Hughes, 10 Mo. Ap. 7.

[2] Hone v. Woolsey, 2 Edw. 289; Conkling v. Carson, 11 Ill. 503; Merrill v. Englesby, 28 Vt. 150; Murray v. Riggs, 15 Johns. 571; s. c. 2 Johns. Ch. 565; Cohens v. Summers, 54 Geo. 501; *vide* Porter v. Williams, 9 N. Y. 142; s. c. 12 How. Pr. 107; Smith v. Howard, 20 How. Pr. 121; Gates v. Andrews, 37 N. Y. 657; Gable v. Williams, 58 Md.

[3] Mackie v. Cairns, 5 Cow. 547; s. c. 1 Hopk. 373; D'Ivernois v. Leavitt, 23 Barb. 63.

[4] Bridges v. Hindes, 16 Md. 101.

[5] Lentilhon v. Moffatt, 1 Edw. 451; Averill v. Loucks, 6 Barb. 470; Mitchell v. Styles, 13 Penn. 306; *vide* Murray v. Riggs, 15 Johns. 571; s. c. 2 Johns. Ch. 565.

and trust for which the property is assigned and to which it is to be appropriated by the assignee, are intelligibly indicated and declared, is an assignment.[1] If the deed is intelligible, brevity is not a badge of fraud.[2] In general, it is not desirable to do more than to direct, in general terms, a sale of the property and collection of the debts assigned, and to designate to what debts and in what order the proceeds shall be applied.[3] An assignment of personal property and *choses in action* need not be under seal.[4] It may be by parol. A mere delivery of the subject assigned is sufficient.[5] The form of the assignment is immaterial. An assignment consisting of three parts is as valid as as assignment consisting of but one part.[6] When an assignment is made by a firm, and some of the partners constitute another firm, the assets of both firms may be assigned by one and the same deed instead of by different deeds.[7] *Choses in action* may be assigned as well as property susceptible of or actually reduced to possession.[8]

SCHEDULES.—No schedule either of the creditors or of the property need be annexed. [9]The fact that it transfers

[1] Norton v. Kearney, 10 Wis. 443.

[2] Forbes v. Scannell, 13 Cal. 242; Meeker v. Sanders, 6 Iowa, 61; State v. Keeler, 49 Mo. 548.

[3] Dunham v. Waterman, 17 N. Y. 9; s. c. 6 Abb. Pr. 357; 3 Duer, 166; Jessup v. Hulse, 21 N. Y. 168; s. c. 29 Barb. 539.

[4] Forbes v. Scannell, 13 Cal. 242.

[5] Brown v. Chamberlain, 9 Fla. 464. [6] Page v. Weymouth, 47 Me. 238.

[7] Gordon v. Cannon, 18 Gratt. 387.

[8] U. S. v. Bank of U. S., 8 Rob. (La.) 262.

[9] Brashear v. West, 7 Pet. 608; Wilt v. Franklin, 1 Binn. 502; Hower v. Geesaman, 17 S. & R. 251; Wooster v. Stanfield, 11 Iowa, 128; Brown v. Chamberlain, 9 Fla. 464; Halsey v. Whitney, 4 Mason, 206; Pearpoint v. Graham, 4 Wash. C. C. 232; Keyes v. Brush, 2 Paige, 311; Cunningham v. Freeborn, 11 Wend. 241; s. c. 1 Edw. 256; 3 Paige, 537; Meeker v. Sanders, 6 Iowa, 61; Parker v. Price, 11 Iowa, 144; Gordon v. Cannon,

money and *choses in action* does not make any difference.[1] An enumeration in detail is not necessary to make a legal transfer. It is sufficient if there is reasonable certainty in the description of the property intended to be conveyed.[2] If there is no such certainty in the description of the articles purported to be conveyed, no transfer is effected.[3] There need be no estimate of the value of the property. All the debtor wants and all the creditors can expect is that the fair value of the property shall be applied to the payment of the debts, and that value is best ascertained by a sale of the property.[4] But where a schedule is made a part of the conveyance, and is referred to as containing a specification of the property intended to be conveyed, it must be annexed not only as a description and specification of the property, but as necessary by the very terms of the instrument to complete the conveyance or transfer, and without it the deed is void.[5]

STATEMENT OF DEBTS.—The assignment need not name the creditors or the amount due to each. This must

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18 Gratt. 387; Forbes v. Scannell, 13 Cal. 242; Linn v. Wright, 18 Tex. 317; Haven v. Richardson, 5 N. H. 113; Deaver v. Savage, 3 Mo. 252; Duvall v. Raisin, 7 Mo. 449; Robins v. Embry, 1 S. & M. Ch. 207; *ex parte* Conway, 12 Ark. 302; U. S. Bank v. Huth, 4 B. Mon. 423; Dana v. Lull, 17 Vt. 390; Kevan v. Branch, 1 Gratt. 274; Brown v. Lyon, 17 Ala. 659; Shackelford v. Planters' Bank, 22 Ala. 238; Hollister v. Loud, 2 Mich. 309; Matthews v. Poultney, 33 Barb. 127; Robinson v. Rapelye, 2 Stew. 86; Strong v. Carrier, 13 Conn. 319; Petrikin v. Davis, Morris, 296; Nye v. Van Husan, 6 Mich. 329; Sadler v. Immel, 15 Nev. 265.

[1] Brown v. Lyon, 17 Ala. 659.

[2] Halsey v. Whitney, 4 Mason, 206; Spring v. Strauss, 3 Bosw. 607; Emerson v. Knower, 25 Mass. 63; Woodward v. Marshall, 39 Mass. 468; Haven v. Richardson, 5 N. H. 113; Rundlett v. Dole, 10 N. H. 458; Clark v. Mix, 15 Conn. 152; Birchell v. Strauss, 28 Barb. 293.

[3] Crow v. Ruby, 5 Mo. 484; Drakeley v. Deforest, 3 Conn. 272; Ryerson v. Eldred, 18 Mich. 12.

[4] Haven v. Richardson, 5 N. H. 113; England v. Reynolds, 38 Ala. 370.

[5] Moir v. Brown, 14 Barb. 39.

necessarily be the form of every general assignment for the benefit of all the creditors, for otherwise it would be special as to the persons named.[1] If the debts are described, a description so as to identify them is all that is necessary, and this is important to the creditors. A debt may be described by the name of the creditor, and its amount may be left to be ascertained subsequently.[2] It is a direction to pay the sum due, whatever that may be.[3] The fact that some of the creditors are workmen is immaterial.[4] There need be no schedule of the creditors to whom no preference is given.[5] An omission of the schedule of preferred creditors will not make the assignment void when the other trusts are capable of execution.[6] Creditors may be required to cause the amount of their claims to be written on a schedule.[7] If the trust is declared in the assignment, the parties may provide for a future enumeration and annex schedules subsequently,[8] or may allow additions to be made to the schedule of creditors with the consent of the debtor, the assignee and any one of the creditors.[9] A clause which requires an oath to be made by the omitted creditors, at the option of the assignee, does not make the assignment void, for it merely reposes confidence in him in the discharge of his duties.[10]

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[1] England v. Reynolds, 38 Ala. 370; Brown v. Knox, 6 Mo. 302; U. S. Bank v. Huth, 4 B. Mon. 423; Barcroft v. Snodgrass, 1 Cold. 430; Van Hook v. Walton, 28 Tex. 59; *vide* Caton v. Moseley, 25 Tex. 374.

[2] Layson v. Rowan, 7 Rob. (La.) 1; Van Hook v. Walton, 28 Tex. 59.

[3] Butt v. Peck, 1 Daly, 83.

[4] Bank v. Talcott, 22 Barb. 550.

[5] Halsey v. Whitney, 4 Mason, 206.

[6] Scott v. Guthrie, 10 Bosw. 408; s. c. 25 How. Pr. 512.

[7] Todd v. Bucknam, 11 Me. 41.

[8] Halsey v. Whitney, 4 Mason, 206; Bank v. Talcott, 22 Barb. 550; Ely v. Hair, 16 B. Mon. 230; Clap v. Smyth, 33 Mass. 247.

[9] Halsey v. Whitney, 4 Mason, 206.

[10] Halsey v. Whitney, 4 Mason, 206.

OMISSION IS BADGE OF FRAUD.—The omission of schedules is, however, a badge of fraud.[1] This is but an application of the maxim that fraud lurks in loose generalities. It is, moreover, difficult to conceive of anything better calculated to delay creditors than a deed of assignment conveying all the property real and personal of the debtor, without any description or estimate of value for the benefit of creditors who are not consulted or named in the deed, or the amounts due them set forth or in any way made known.[2]

DESIGNATION OF ASSIGNEE.—The assignee must be designated. When the assignment is made to partners, it is not material whether they are designated by the firm name or their individual names, if the language used is such as to indicate with certainty the persons who are nominated as assignees.[3] The insertion of the name of the assignee is essential to the validity of the instrument.[4]

DELIVERY OF THE ASSIGNMENT.—A delivery of the

[1] Brown v. Lyon, 17 Ala. 659; Pine v. Rikert, 21 Barb. 469; Kellogg v. Slauson, 11 N. Y. 302; s. c. 15 Barb. 56; Van Nest v. Yoe, 1 Sandf. Ch. 4; Pearpoint v. Graham, 4 Wash. C. C. 232; Stevens v. Bell, 6 Mass. 339; Halsey v. Whitney, 4 Mason, 206; Wilt v. Franklin, 1 Binn. 502; Young v. Gillespie, 12 Heisk. 239.

[2] Cummings v. McCullough, 5 Ala. 324; Overton v. Hollinshade, 5 Heisk. 283. In Indiana, the schedule need not be recorded with the assignment. Black v. Weathers, 26 Ind. 242. In New York, by act of 1860, Ch. 348, § 2, the debtor is required within twenty days to make and deliver to the county judge an inventory verified by affidavit. A failure to comply with the statute makes the assignment void. Juliand v. Rathbone, 39 N. Y. 369; Fairchild v. Gwynne, 16 Abb. Pr. 23; s. c. 14 Abb. Pr. 121; De Camp v. Marshall, 2 Abb. Pr. (N. S.) 373. *Contra*, Evans v. Chapin, 12 Abb. Pr. 161; s. c. 20 How. Pr. 289; Van Vleet v. Slauson, 45 Barb. 317; Barbour v. Everson, 16 Abb. Pr. 366; Read v. Worthington, 9 Bosw. 617.

[3] Forbes v. Scannell, 13 Cal. 242.

[4] Reamer v. Lamberton, 59 Penn. 462.

assignment to the assignee is sufficient.[1] A delivery in fact or in law to some person, or into some place beyond the debtor's control, is indispensable.[2] A delivery to the clerk to be recorded,[3] or to a third person,[4] or a deposit of it in the postoffice,[5] is sufficient.

ACCEPTANCE OF THE TRUST.—There must also be an acceptance of the trust. A delivery of the assignment without an acceptance of the trust is nugatory.[6] The mere taking of the instrument and retaining it is nothing. An agreement to accept before the execution of the assignment is sufficient.[7] The acceptance will be presumed;[8] but this presumption is liable to be rebutted.[9] An acceptance before any adverse steps are taken by others is sufficient.[10] It is not necessary for the assignee to sign the assignment to make it valid. All that equity requires is his assent and acceptance of the trust. If he does any one act by which his assent may be implied, equity holds him bound for its performance and will not release him from his voluntary obligation. Any act done in relation to the property showing that he claims it as assignee, or

[1] Ingraham v. Grigg, 21 Miss. 22.

[2] Marston v. Coburn, 17 Mass. 454; M'Kinney v. Rhoades, 5 Watts, 343; Brevard v. Neely, 2 Sneed, 164; Caldwell v. Bruggerman, 4 Minn. 270; Van Hook v. Walton, 28 Tex. 59.

[3] Tompkins v. Wheeler, 16 Pet. 106; Major v. Hill, 13 Mo. 247; Hoffman v. Mackall, 5 Ohio St. 124.

[4] Moore v. Collins, 3 Dev. 126.

[5] M'Kinney v. Rhoades, 5 Watts, 343.

[6] Crosby v. Hillyer, 24 Wend. 280; Quincy v. Hall, 18 Mass. 357; Pierson v. Manning, 2 Mich. 445.

[7] Hoffman v. Mackall, 5 Ohio St. 124.

[8] Wilt v. Franklin, 1 Binn. 502; M'Kinney v. Rhoades, 5 Watts, 343; Siggers v. Evans, 32 Eng. L. & Eq. 139.

[9] Wilt v. Franklin, 1 Binn. 502; Crosby v. Hillyer, 24 Wend. 280; Pierson v. Manning, 2 Mich. 445; Spencer v. Ford, 2 Rob. Va. 648.

[10] Lampson v. Arnold, 19 Iowa, 479; Nailer v. Young, 7 Lea. 755.

desires to reduce it into possession, undeniably proves his assent.[1] Taking possession of the estate is an acceptance of the trust, and binds the assignee to execute it in every particular as effectually as if he enters into an express covenant to do so.[2] When there are two assignees, if one refuses to accept, the other assignee becomes vested with the trust in the same manner as if the dissenting assignee had not been named in the instrument.[3] The assignee can not, without the consent of the debtor, accept the assignment in part and reject it in part. If he adopts it at all he must adopt it *in toto*. He can not affirm it as to some debts and disaffirm it as to others.[4] The assignee's title to the goods is complete by the execution of the assignment, subject to be defeated by his laches in not giving reasonable notice, or in not following up his title to possession.[5]

NOTICE TO CREDITORS.—The recording of an assignment is, in the absence of fraud, sufficient notice to creditors.[6]

LEGAL EFFECT.—An assignment creates a trust. All the legal interests vest nominally in the assignee, but substantially in the *cestuis que trust* or creditors, and the

[1] *Ex parte* Conway, 12 Ark. 302; Flint v. Clinton Co., 12 N. H. 430; State v. Beuoist, 37 Mo. 500.

[2] Cunningham v. Freeborn, 11 Wend. 241; s. c. 1 Edw. 256; 3 Paige, 537; Price v. Parker, 11 Iowa, 144.

[3] Mead v. Phillips, 1 Sandf. Ch. 83; Moir v. Brown, 14 Barb. 39; Metcalf v. Van Brunt, 37 Barb. 621; Gordon v. Coolidge, 1 Sumner, 537; *ex parte* Conway, 12 Ark. 302; Forbes v. Scannell, 13 Cal. 242.

[4] Gordon v. Coolidge, 1 Sumner, 537.

[5] Bholen v. Cleveland, 5 Mason, 174; West v. Tupper, 1 Bailey, 193; Frazier v. Fredericks, 24 N. J. 162; Wilt v. Franklin, 1 Bin. 502. *Contra*, Caldwell v. Bruggerman, 4 Minn. 270.

[6] Farquharson v. Eichelberger, 15 Md. 63.

residuum, if any, after the payment of debts results to the grantor. The assignee has not even a beneficiary interest in the estate; he is seized for others, and not for himself. The moment he is seized, that moment all the substantial interests pass out of him into others. He is merely the legal recipient or organ by which the conveyance is rendered valid for higher and more beneficial purposes. In no possible event or contingency can he take or retain any interest in his own hands for himself without being called to account and pay over to those who are equitably entitled to take it. All the parties to the assignment have the right to go into a court of equity and have the trust specifically executed.[1]

Incident of Ownership.—The right to make an assignment results from that absolute dominion which every man has over that which is his own, and is not of itself calculated to excite suspicion.[2] If a debtor can make a valid assignment of his property to his creditors to pay his debts, he can execute a like conveyance to an assignee to discharge the demands of his creditors. The assignee is the medium through which the payment is directed to be made. He is seized of the legal estate for the benefit of the creditors, all equity being in the *cestuis que trust*, and the assignment only constitutes the means and appointment by which debts are to be paid. If a debtor can pay his debts directly to his creditors himself, there is nothing to prevent him from directing a third person or assignee to pay them. If in one instance it is a moral as well as a

[1] *Ex parte* Conway, 12 Ark. 302; U. S. Bank v. Huth, 4 B. Mon. 423; Hall v. Dennison, 17 Vt. 310; Houston v. Nowland, 7 G. & J. 480; Marbury v. Brooks, 7 Wheat. 556; s. c. 11 Wheat. 78.

[2] Brashear v. West, 7 Pet. 608; *ex parte* Conway, 12 Ark. 302.

legal duty to pay, in the other it is but the performance of the same act, and is supported by the same just consideration. Neither the amount of the indebtedness nor the means by which debts are directed to be paid can alter the right to make payment. It is the right as well as the duty of a debtor to devote his property to the satisfaction of his debts, and the exercise of this right by the honest performance of this duty can not be deemed a fraud. Such an assignment is usually made to an assignee because this mode of distributing the fund is in general far more convenient than for the debtor to make payment directly to the creditors themselves. It is doing the same thing indirectly instead of directly.[1]

WHO MAY ASSIGN.—A corporation, unless restrained by some statute or express provision in its charter, may make an assignment as well as an individual.[2] But the assignment to be valid must be made in pursuance of a resolution of the board of directors.[3] An assignment may be made by an executor.[4]

PARTNERS.—It is not competent for one partner, without the assent or authority of the other partners, to make

[1] *Ex parte* Conway, 12 Ark. 302.

[2] Hill v. Reed, 16 Barb. 280; McCallie v. Walton, 37 Geo. 611; State v. Bank, 6 G. & J. 205; Union Bank v. Ellicott, 6 G. & J. 363; De Ruyter v. St. Peter's Church, 3 N. Y. 238; s. c. 3 Barb. Ch. 119; Pope v. Brandon, 2 Stew. 401; Robins v. Embry, 1 S. & M. Ch. 207; *ex parte* Conway, 12 Ark. 302; Flint v. Clinton Co., 12 N. H. 430; Hopkins v. Gallatin Co., 4 Humph. 403; Loudon v. Parsley, 7 Jones (N. C.) 313. Assignments by corporations, in contemplation of insolvency, are prohibited in New York by 1 Rev. Stat. 603, § 4; Sibell v. Remsen, 33 N. Y. 95; Smith v. Consolidated Stage Co., 18 Abb. Pr. 418; Robinson v. Bank, 21 N. Y. 406; Loring v. Vulcanized Gutta Percha Co., 36 Barb. 329; s. c. 30 Barb. 644; Harris v. Thompson, 15 Barb. 62.

[3] Richardson v. Rogers, 45 Mich. 591.

[4] Wolverhampton Bank v. Marston, 7 H. & N. 146.

a general assignment of the partnership property to a trustee for the payment of debts. No such power can be implied from the partnership relation. Each partner possesses an equal and general power and authority in behalf of the firm to dispose of the partnership property and effects for any and all purposes within the scope of the partnership and in the course of its trade and business. But the authority of each of several partners as agent of the firm is necessarily limited to transactions within the scope and object of the partnership and in the course of its trade or affairs. A general assignment to a trustee of all the funds and effects of the partnership for the benefit of creditors is the exercise of a power without the scope of the partnership enterprise, and amounts of itself to a suspension or dissolution of the partnership itself. It is no part of the ordinary business of the partnership, but outside and subversive of it. No such authority as that can be implied from the partnership relation.[1] One partner, however, may execute an assignment when he has previous authority.[2] The same reason applies where an

[1] Welles v. March, 30 N. Y. 344; Coope v. Bowles, 42 Barb. 87; s. c. 18 Abb. Pr. 442; s. c. 28 How. Pr. 10; Robinson v. Gregory, Appeals Dec. 1863; s. c. 29 Barb. 560; Hughes v. Ellison, 5 Mo. 463; Dana v. Lull, 17 Vt. 390; Hook v. Stone, 34 Mo. 329; Gates v. Andrews, 37 N. Y. 657; Stein v. La Dow, 13 Minn. 412; Havens v. Hussey, 5 Paige, 30; Hitchcock v. St. John, 1 Hoff. Ch. 511; Kirby v. Ingersoll, Harring. Ch. 172; Sheldon v. Smith, 28 Barb. 593; McClelland v. Remsen, 36 Barb. 622; s. c. 14 Abb. Pr. 331; s. c. 23 How. Pr. 175; Bowen v. Clark, 5 A. L. Reg. 203; Mauglin v. Tyler, 47 Md. 545. *Contra*, Deckard v. Case, 5 Watts, 22; Hennessey v. Western Bank, 6 W. & S. 300; Robinson v. Crowder, 4 McCord, 519; Gordon v. Cannon, 18 Gratt. 387.

[2] Welles v. March, 30 N. Y. 344; Baldwin v. Tynes, 19 Abb. Pr. 32; Kelly v. Baker, 2 Hilt. 531; Roberts v. Shephard, 2 Daly, 110; Harrison v. Sterry, 5 Cranch, 289; Kendall v. New Eng. Carpet Co., 13 Conn. 383; Pike v. Bacon, 21 Me. 280; Kemp v. Carnley, 3 Duer, 1; Forbes v. Scannell, 13 Cal. 242; Lassel v. Tuckner, 5 Sneed, 1; Williams v. Frost, 27 Minn. 255.

extraordinary emergency occurs in the affairs of the partnership and the other partner can not be consulted on account of his absence under circumstances which furnish reasonable ground for inferring that he intended to confer upon the assigning partner authority to do any act for the firm which could be done with his concurrence if he were present. An assignment will be valid when the assignor is the sole manager and the other partner lives out of the State[1] or in a foreign country.[2] One partner may also make an assignment when the other partner assents,[3] or absconds,[4] or has sold out his interest to the assignor.[5] A dormant partner need not execute the assignment.[6] Surviving partners may make an assignment.[7] Partners may make an assignment although one of them is a minor, for a trust deed by an infant is valid until he avoids it, and binds the trustee and all others until he elects to disaffirm it.[8]

INCIDENTAL DELAY.—The necessary effect of every general assignment, even where the creditors are to be paid *pari passu*, is to hinder and delay them in the collection of their debts, by withdrawing the property from the reach of any legal process to which they may wish to resort. It interrupts and presents obstacles to their legal

[1] McCullough v. Summerville, 8 Leigh, 415.

[2] Forbes v. Scannell, 13 Cal. 242.

[3] Ely v. Hair, 16 B. Mon. 230; Mills v. Argall, 6 Paige, 577.

[4] Palmer v. Myers, 29 How. Pr. 8; s. c. 43 Barb. 9; National Bank v. Sackett, 2 Daly, 395.

[5] Clark v. McClelland, 2 Grant, 31. [6] Drake v. Rogers, 6 Mo. 317.

[7] Egbert v. Woods, 3 Paige, 517; Hutchinson v. Smith, 7 Paige, 26; French v. Lovejoy, 12 N. H. 458. *Contra*, Barcroft v. Snodgrass, 1 Cold. 430.

[8] Yates v. Lyon, 61 N. Y. 344; s. c. 61 Barb. 205. *Contra*, Fox v. Heath, 21 How. Pr. 384; s. c. 16 Abb. Pr. 163.

remedies, and thus tends to hinder those who are disposed to prosecute their suits.[1] Not only is such its necessary effect, but the actual intent of the debtor generally is to place the property beyond the immediate power and action of his creditors, by preventing them from obtaining any judgments by which it may be bound, or from issuing any execution or attachment under which it may be sold. He means to hinder the creditors from collecting their debts out of his property by any proceedings against himself as their debtor, and to delay them from receiving any portion of their debts until they shall become entitled to a dividend under the assignment. The intent thus to hinder and delay them is not only to be plainly deduced from the nature of the trust, but not unfrequently is confessed by its terms. In fact it was upon this very ground, the apparent and certain intent to hinder and delay the creditors, that originally the validity of a general assignment, although for the benefit of all the creditors without distinction, was not only seriously doubted, but seriously contested.[2] But it is not every conveyance which will have the effect of delaying or hindering creditors in the collection of their debts that is fraudulent within the statute, for such is the effect *pro tanto* of every assignment that can be made by one who has creditors. Every assignment of a man's property, however good and honest the consideration, must diminish the fund out of which satisfaction is to be made to his creditors.

WHAT INTENT IS NECESSARY.—The object of the statute is to prevent deeds fraudulent in their inception

[1] Dunham v. Waterman, 17 N. Y. 9; s. c. 6 Abb. Pr. 357; 3 Duer 166; *vide* Burdick v. Post, 12 Barb. 168; s. c. 6 N. Y. 522.

[2] Pickstock v. Lyster, 3 M. & S. 371; King v. Watson, 3 Price, 6.

and intention, and not merely such as in their effect may hinder or delay creditors. It is the corrupt and covinous motive, the fraudulent intention, the *mala mens*, with which the assignment or conveyance is made, that constitutes the fraud against which the denunciations of the statute are directed, and without the existence in fact, or presumed existence, of an immoral or bad intention or motive, fraud can not be perpetrated either at common law or under the statute.[1] Fraud depends not upon the fact of delay, but upon the character of the delay and the motive which actuates it.[2] The statute was never intended to restrict the debtor from paying or securing creditors whom moral duty and a sense of justice may dictate the propriety of paying or securing, or from doing equal and exact justice to all by placing his means in a condition to that end. So long as a debtor remains in contemplation of law the absolute owner of property, it can not be said of an appropriation of that property exclusively to the purpose of paying debts that it is a contrivance to delay, hinder and defraud creditors. He merely exerts a power over property which the law gives him as owner for a purpose which is not in law wrongful.[3] Such an appropriation can not be deemed to be made with the fraudulent intent or purpose to hinder or delay, but with the higher and better intent and purpose of paying or securing all equally, or providing for those who are most meritorious.[4] All the law can reasonably demand

[1] U. S. Bank v. Huth, 4 B. Mon. 423; Hollister v. Loud, 2 Mich. 309; Meux v. Howell, 4 East, 1; Hafner v. Irwin, 1 Ired. 490; U. S. v. Bank of U. S., 8 Rob. (La.) 262; True v. Congdon, 44 N. H. 48; Church v. Drummond, 7 Ind. 17; Gates v. Labeaume, 19 Mo. 17; Baldwin v. Peet, 22 Tex. 708.

[2] Christopher v. Covington, 2 B. Mon. 357.

[3] Hafner v. Irwin, 1 Ired. 490.

[4] U. S. Bank v. Huth, 4 B. Mon. 423; Nimmo v. Kuykendall, 85 Ill. 476.

is a faithful application of the debtor's property to the payment of debts, and when this object is accomplished by an assignment or deed of trust for the benefit of his creditors, the hindrance and delay which may operate to the prejudice of particular creditors is simply an unavoidable incident to a just and lawful act. Such mere incident to a lawful act does not vitiate the transfer.[1]

Intent to Defeat Execution.—Although the intent to deprive all or particular creditors of their lawful suits, and hinder and delay them in the recovery of their just demands, is confessed or proved, still the assignment, if by its terms all the property which it embraces must be applied ratably or otherwise to the payment of debts, is upheld as valid and effectual. The mere intent to avoid an execution or other legal process does not in point of law make it void.[2] It may even be made on the same day that a verdict is rendered against the assignor,[3] or the claim of the creditor assailing it may be specially in the contemplation of the debtor.[4] It will not in such case be

[1] Hoffman v. Mackall, 5 Ohio St. 124; Townsend v. Stearns, 32 N. Y. 209; Guerin v. Hunt, 8 Minn. 477; s. c. 6 Minn. 375. In some of the cases it is said that the fraud depends upon the primary motive. If the primary motive is to delay, then the assignment is fraudulent; but if the primary motive is to make a distribution of the property, it is valid. In one hindrance or delay is the main and primary purpose, in the other it is only an incidental effect. Eyre v. Beebe, 28 How. Pr. 333; Stickney v. Crane, 35 Vt. 89; Baldwin v. Peet, 22 Tex. 708.

[2] Riches v. Evans, 9 C. & P. 640; Johnson v. Osenton, L. R. 4 Ex. 107; Lee v. Green, 35 Eng. L. & Eq. 261; Bowen v. Bramidge, 6 C. & P. 140; Wolverhampton Bank v. Marston, 7 H. & N. 146; Wilt v. Franklin, 1 Binn. 502; Pickstock v. Lyster, 3 M. & S. 371; Jackson v. Cornell, 1 Sandf. Ch. 348; Heydock v. Stanhope, 1 Curt. 471; Reed v. McIntyre, 98 U. S. 507; *vide* Dalton v. Currier, 40 N. H. 237.

[3] Jackson v. Cornell, 1 Sandf. Ch. 348.

[4] Horwitz v. Ellinger, 31 Md. 492.

void, even as against the persons who are in fact very materially hindered and delayed, and were meant to be so. It is valid even against the creditors whom it deprives and is intended to deprive of that full satisfaction of their debts which, by their superior diligence in prosecuting their suits, they would otherwise have certainly obtained. The explanation is that although in these cases the intent to hinder and delay the creditors is manifest, it is just as certain that there is no intent to cheat or defraud them, and the reasonable construction of the statute is that it is only such a hindrance or delay as is intended to operate, or, if permitted, could operate, as a fraud upon the creditors, that was meant to be prohibited.[1]

All the law can reasonably demand of a debtor is the faithful application of his entire property to the satisfaction of his debts, and where by the terms of the assignment this is secured, the hindrance and delay which they create, however they may operate to the prejudice of particular creditors, are disregarded, since they are only the necessary means of accomplishing a justifiable and lawful end. They fall, it is true, within the words of the statute, but as they are free from the imputation of fraud, and produce no benefit to the debtor at the expense of the creditors, they are not embraced within its meaning and are justly excluded from its operation.[2] It makes no difference, therefore, that the debtor is in failing circumstances, that suits are threatened, that judgments exist against him, or that executions against him are momentarily expected. Under any or all of these contingencies he has the full and absolute right to dispose of his pro-

[1] Hoffman v. Mackall, 5 Ohio St. 124.

[2] Nicholson v. Leavitt, 4 Sandf. 252; s. c. 6 N. Y. 510; 10 N. Y. 591.

perty for the payment of his debts.[1] The fact, therefore, that the assignment is made for the purpose of avoiding the preference that might otherwise be obtained by legal process in a race of eager diligence by disappointed creditors, does not make the assignment invalid. Such is generally the motive to the making of such an assignment.[2]

Secret Motives.—The inducements which may have led to the assignment are not to be inquired into. The law deals with the act of the party, and not with the secret springs which prompted it.[3] If the assignment is such as the law authorizes and approves, the secret motives that prompted it are entirely immaterial.[4] Even a stratagem to prevent an execution till an assignment can be made will not render it void. This is due to the fact that creditors have no lien upon a debtor's property. The dominion over it is vested in the debtor, and so long as the property continues to belong to him unaffected by liens, his conduct for the purpose of imposing upon a creditor and keeping him at bay will not divest him of that dominion, or disqualify him from making an appropriation of it for the benefit of his creditors.[5] This, moreover, is not the kind of fraud that makes an assignment void. The only illegality which avoids it is that which makes or endeavors to make it the instrument of defeating or delaying the collection of debts. It is not, therefore, for the same reason competent for a creditor to vacate an assignment as to himself, while it may be good as to every one else, by showing that there was fraud or misrepre-

[1] Stewart v. English, 6 Ind. 176; Hollister v. Loud, 2 Mich. 309.
[2] Horwitz v. Ellinger, 31 Md. 492. [3] Pike v. Bacon, 21 Me. 280.
[4] Horwitz v. Ellinger, 31 Md. 492; Mackintosh v. Corner, 33 Md. 598; Wilson v. Berg, 88 Penn. 167. [5] Pike v. Bacon, 21 Me. 280.

sentation on the part of the debtor in the creation of the debt due to him.[1]

FRAUDULENT INTENT.—Although an assignment is made for the purpose of securing genuine debts, that may not be the only purpose. It may be one purpose, and yet the assignment may be fraudulently made.[2] But the only intent which will vitiate the assignment is a fraudulent intent, that is, an intent which the law will not permit to be carried into effect, an intent to secure some benefit to the debtor, or to withhold some right from his creditors beyond what the law permits. If this intent is expressed in the assignment, the court may declare it to be void; but if the fraudulent intent is not expressed in the assignment, then it can only be invalidated by proof that the fraudulent intent existed at the time of the execution of the assignment.[3] An assignment can not be made the means of covering up and preserving the property for the debtor's use, or of withdrawing and protecting it from the lawful actions, remedies and demands of his creditors. If it is devised and contrived as a scheme for keeping the property under the secret control of the debtor, or for keeping it out of the market for an indefinite period, or until there shall be a rise in the prices, or for locking it up in any way for the debtor's own use and benefit, or as a means of forcing the creditors to accept a settlement;[4]

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[1] Horwitz v. Ellinger, 31 Md. 492; Mattison v. Demarest, 4 Robt. 161; Pearce v. Jackson, 2 R. I. 35; Reinhard v. Bank of Ky., 6 B. Mon. 252; Kennedy v. Thorpe, 51 N. Y. 174; s. c. 2 Daly, 45; 3 Abb. Pr. (N. S.) 131; Waverly Bank v. Halsey, 57 Barb. 249; Talcott v. Rosenthal, 29 N. Y. Supr. 573; Lininger v. Raymond, 12 Neb. 19, 167.

[2] State v. Benoist, 37 Mo. 500.

[3] Bailey v. Mills, 27 Tex. 434; Van Hook v. Walton, 28 Tex. 59.

[4] Keevil v. Donaldson, 20 Kans. 165.

if it is not designed in good faith for the payment of debts really owed, but the whole transaction is conceived in collusion, malice, covin and bad faith, and tainted with secret fraud, it is void.[1]

To Prevent Sacrifice.—But the mere intent on the part of the debtor to prevent a sacrifice of his property does not necessarily and of itself render an assignment void. This will depend upon the purpose with which the sacrifice is sought to be avoided. If the purpose is to prevent a race of diligence among creditors so that they may receive a larger dividend, it is lawful. But if the purpose is to prevent the sacrifice that would be caused by a forced sale, so that the debtor may receive a larger surplus after the payment of his debts, it is unlawful and fraudulent.[2] A sale of all the debtor's property followed immediately by an assignment of the notes received in payment, is fraudulent if it is made for the purpose of preventing a sacrifice and keeping the property for his benefit.[3] If the purchase, however, is in good faith, the giving of a note and the making of an assignment shortly afterwards is no fraud.[4]

Fraud must be in the Beginning.—The only fraud which will vitiate an assignment is fraud in its concoction.

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[1] State v. Benoist, 37 Mo. 500; Work v. Ellis, 50 Barb. 512; Wilson v. Pearson, 20 Ill. 81; Byrd v. Bradley, 2 B. Mon. 239; Smith v. Leavitts, 10 Ala. 92; Caldwell v. Williams, 1 Ind. 405; Fuller v. Ives, 6 McLean, 478.

[2] Angell v. Rosenburg, 12 Mich. 241; Shackelford v. Planters' Bank, 22 Ala. 238; Hefner v. Metcalf, 1 Head, 577; Gere v. Murray, 6 Minn. 305; *vide* Ward v. Trotter, 3 Mon. 1.

[3] Litchfield v. Pelton, 6 Barb. 187; Cooke v. Smith, 3 Sandf. Ch. 333; Mills v. Carnley, 1 Bosw. 159.

[4] Loeschigk v. Baldwin, 38 N. Y. 326; s. c. 1 Robt. 377.

If there is no fraud in its inception, the property vests immediately in the assignee for the benefit of the creditors, and no subsequent fraudulent dealings can revest the property in the debtor, or have a retroactive effect so as to avoid the assignment itself.[1] An assignment honestly made for an honest purpose can not be defeated by proof that the assignee abused his trust, misappropriated the property, or acted however dishonestly in its disposal, or that he took unwise or even apparently dishonest means to preserve the property from litigation or levy by a creditor.[2]

ASSIGNEE'S PARTICIPATION.—An assignment is founded upon a valuable consideration. It is not like a mere gift, for it is supported by the obligation assumed by the assignee and by the debts due to the creditors. Although the conveyance is in terms to the assignee, it is in fact to the creditors, and they are the real beneficiaries. It is true that there is no presumption that the creditors assent to the assignment if it is fraudulent, and in such a case the consideration of the debts due to them does not arise

[1] Klapp v. Shirk, 13 Penn. 589; Shattuck v. Freeman, 42 Mass. 10; Petrikin v. Davis, Morris, 296; Wooster v. Stanfield, 11 Iowa, 128; Hotop v. Durant, 6 Abb. Pr. 371, note; Cox v. Platt, 32 Barb. 126; s. c. 19 How. Pr. 121; Matthews v. Poultney, 33 Barb. 127; Browning v. Hart, 6 Barb. 91; Wilson v. Forsyth, 24 Barb. 105; Pike v. Bacon, 21 Me. 280; Gates v. Labeaume, 19 Mo. 17; Hempstead v. Johnson, 18 Ark. 123; Cornish v. Dews, 18 Ark. 172; Beck v. Parker, 65 Penn. 262; Baldwin v. Buckland, 11 Mich. 389.

[2] Cuyler v. McCartney, 40 N. Y. 221; s. c. 33 Barb. 165; Hotop v. Durant, 6 Abb. Pr. 371, note; Matthews v. Poultney, 33 Barb. 127; U. S. Bank v. Huth, 4 B. Mon. 423; Meeker v. Sanders, 6 Iowa, 61; Savery v. Spaulding, 8 Iowa, 239; Cox v. Platt, 32 Barb. 126; s. c. 19 How. Pr. 121; Shattuck v. Freeman, 42 Mass. 10; Petrikin v. Davis, Morris, 296; Wooster v. Stanfield, 11 Iowa, 128; Eicks v. Copeland, 53 Tex. 581; Olney v. Tanner, 10 Fed. Rep. 171.

until they actually assent to it, but the obligation of the assignee remains nevertheless, and is of itself sufficient to support the conveyance.[1] In such a case, when the creditors give their express assent to it, their debts constitute an additional consideration.[2] A fraudulent intent, therefore, on the part of the debtor alone is not sufficient to avoid the assignment, when neither the creditors nor the assignee participate in the fraud. The act is right although the intent may be wrong, and it seems unreasonable to hold the act void when the assignee himself, perhaps, may prevent the accomplishment of the intent. Notice of the fraud to the assignee, however, is sufficient.[4]

[1] Bancroft v. Blizzard, 13 Ohio, 30; Thomas v. Talmadge, 16 Ohio St. 434; Hollister v. Loud, 2 Mich. 309.

[2] Benning v. Nelson, 23 Ala. 801.

[3] Myers v. Kinzie, 26 Ill. 36; Wise v. Wimer, 23 Mo. 237; Gates v. Labeaume, 19 Mo. 17; State v. Keeler, 49 Mo. 548; Wilson v. Eifler, 7 Cold. 31; Marbury v. Brooks, 7 Wheat. 556; s. c. 11 Wheat. 78; Bancroft v. Blizzard, 13 Ohio, 30; Thomas v. Talmadge, 16 Ohio St. 434; Cornish v. Dews, 18 Ark. 172; Mandel v. Peay, 20 Ark. 325; Hollister v. Loud, 2 Mich. 309; Governor v. Campbell, 17 Ala. 566; Abercrombie v. Bradford, 16 Ala. 560; Holt v. Kelly, 13 Ir. L. R. 33. *Contra*, Rathbun v. Platner, 18 Barb. 272; Foley v. Bitter, 34 Md. 646; Griffin v. Marquardt, 17 N. Y. 28; s. c. 21 N. Y. 121; Mead v. Phillips, 1 Sandf. Ch. 83; Wilson v. Forsyth, 24 Barb. 105; Kayser v. Heavenrich, 5 Kansas, 324; Hairgrove v. Millington, 8 Kans. 480; Gere v. Murray, 6 Minn. 305; Stickney v. Crane, 35 Vt. 89; Irwin v. Keen, 3 Whart. 347; Flanigan v. Lampman, 12 Mich. 58; Lampson v. Arnold, 19 Iowa, 479; Ruble v. McDonald, 18 Iowa, 493; Pierson v. Manning, 2 Mich. 445; Stone v. Marshall, 7 Jones (N. C.) 300; Craft v. Bloom, 59 Miss. In some cases it is held that the assignment is void as against an attachment or levy made before any creditors actually assent to it. Townsend v. Harwell, 18 Ala. 301; Stewart v. Spencer, 1 Curt. 157; Benning v. Nelson, 23 Ala. 801; Green v. Banks, 24 Tex. 508; Baldwin v. Peet, 22 Tex. 708.

[4] State v. Benoist, 37 Mo. 500; Caldwell v. Williams, 1 Ind. 405; Caldwell v. Rose, 1 Smith, 190; Stewart v. Spencer, 1 Curt. 157; Crow v. Beardsley, 68 Mo. 435; Prewitt v. Wilson, 103 U. S. 22; s. c. 3 Woods, 631. *Contra*, Pinneo v. Hart, 30 Mo. 561.

An acceptance of the assignment with notice of such facts as are sufficient to put him on the inquiry will invalidate it.[1] When the assignee participates in the fraud, a presumption of assent on the part of the creditors would also involve a presumption that they have notice of the facts which make the assignment fraudulent, and are thus parties and participators in the fraud.[2]

CONSTRUCTION OF DEED.—Fraud is always a question of intent, for no man can justly be said to be guilty of a fraud by accident or mistake.[3] The law, however, presumes that every person intends the consequences which necessarily flow from his acts,[4] and that he understands the legal import of every instrument which he executes. The construction of an instrument is a question of law. Its legal effect is a matter upon which the court ought to pass.[5] Whenever the fraud is apparent upon the face of an instrument it is a question of fraud in law. Evidence that an assignment was designed to be beneficial is in such a case inadmissible. There is nothing for a jury to pass upon when an instrument is fraudulent on its face. The validity of an assignment is in such a case determined by the character with which the law stamps it, without reference to extrinsic facts as to motive. If the law imputes to the grantor a design in making an assignment, no evidence of intention can change the presumption. If the law declares an assignment to be void, it is no matter

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[1] Stewart v. Spencer, 1 Curt. 157.

[2] Green v. Banks, 24 Tex. 508; State v. Benoist, 37 Mo. 500; *vide* Marbury v. Brooks, 7 Wheat. 556; s. c. 11 Wheat. 78.

[3] Grover v. Wakeman, 11 Wend. 187, per Senator Edmonds.

[4] Mackie v. Cairns, 5 Cow. 547; s. c. 1 Hopk. 373.

[5] Sheldon v. Dodge, 4 Denio, 217.

how the question of fraud in fact may stand.[1] When an assignment is fraudulent on its face it is void, without reference to the actual knowledge of either the assignee or the creditors. The fraudulent stipulation in the assignment fixes the assignee and all the creditors claiming under it with a concurrence in the unlawful intent.[2] When the instrument, however, appears to be fair, and its validity depends upon extrinsic evidence, the question must be submitted to the proper tribunal to determine as a matter of fact whether it is fraudulent or not.[3]

Several Instruments may constitute one Transaction.—All papers executed in pursuance of an original design contemplated and determined upon in the beginning, are in law deemed to constitute one transaction, and are construed together, whether made on the same day[4] or on different days.[5] The mere fact that two or more conveyances are made at the same time has no necessary influence upon determining whether they constitute one transaction.[6] An individual may not only execute on the same

[1] Green v. Trieber, 3 Md. 11; Malcolm v. Hodges, 8 Md. 418; Inloes v. American Exchange Bank, 11 Md. 173; Goodrich v. Downs, 6 Hill, 438; Boardman v. Halliday, 10 Paige, 223; Abercrombie v. Bradford, 16 Ala. 560; Pierson v. Manning, 2 Mich. 445; Murray v. Riggs, 15 Johns. 571; s. c. 2 Johns. Ch. 565; Harris v. Sumner, 19 Mass. 129; Richards v. Hazzard, 1 Stew. & Port. 139; Howell v. Edgar, 4 Ill. 417.

[2] Palmer v. Giles, 5 Jones Eq. 75.

[3] Johnson v. McAllister, 30 Mo. 32 7; Dunham v. Waterman, 17 N. Y. 9; s. c. 6 Abb. Pr. 357; 3 Duer, 166.

[4] Mussey v. Noyes, 26 Vt. 462; Kruse v. Prindle, 8 Oregon, 158; Schoolfield v. Johnson, 11 Fed. Rep. 297.

[5] Berry v. Cutts, 42 Me. 445; Holt v. Bancroft, 30 Ala. 193; Burrows v. Lehndorf, 8 Iowa, 96; Spaulding v. Strang, 36 Barb. 310; s. c. 32 Barb. 235; s. c. 37 N. Y. 135; s. c. 38 N. Y. 9; M'Allister v. Marshall, 6 Binn. 338; Cummings v. McCullough, 5 Ala. 324.

[6] Lampson v. Arnold, 19 Iowa, 479; Mann v. Whitbeck, 17 Barb. 388; Norton v. Kearney, 10 Wis. 443.

day, but be preparing at the same time a conveyance for the purpose of defrauding his creditors and another for the purpose of securing an honest debt. In such case the two acts could not properly be said to be one and the same transaction, the object and the end of one being entirely different from the object and end of the other.[1] It has for this reason been held that conveyances made at different dates for the purpose of securing different sums can be considered as one transaction.[2] Whether the instruments constitute one transaction is a question for the jury.[3] A valid instrument, however, can never be impaired by a subsequent attempt to aid it by an invalid instrument.[4]

One Fraudulent Clause vitiates the whole Deed.—A fraudulent stipulation makes the whole instrument void. When an assignment is void as to part, it is void altogether. The taint as to part affects the entirety. Where a conveyance is good in part and bad in part as against the provision of the statute, it is void *in toto*, and no interest passes to the grantee under the part which is good.[5] The parties to the assignment can not produce evidence, where the validity of the assignment is assailed, to show that the vicious clause apparent on its face was

[1] Mower v. Hanford, 6 Minn. 535.

[2] Wynkoop v. Shardlow, 44 Barb. 84.

[3] Mower v. Hanford, 6 Minn. 535.

[4] Lansing v. Woodworth, 1 Sandf. Ch. 43.

[5] Albert v. Winn, 5 Md. 66; s. c. 7 Gill. 446; s. c. 2 Md. Ch. 169; s. c. 2 Md. Ch. 42; Hyslop v. Clarke, 14 Johns. 458; Mackie v. Cairns, 5 Cow. 547; s. c. 1 Hopk. 373; Goodrich v. Downs, 6 Hill, 438; McClurg v. Lecky, 3 Penna. 83; Robins v. Embry, 1 S. & M. Ch. 207; Jacot v. Corbett, 1 Chev. Eq. 71; Howell v. Edgar, 4 Ill. 417; Dana v. Lull, 17 Vt. 390; Caldwell v. Williams, 1 Ind. 405; Pierson v. Manning, 2 Mich. 445; Green v. Branch Bank, 33 Ala. 643; Greenleaf v. Edes, 2 Minn. 264; Palmer v. Giles, 5 Jones Eq. 75; *vide* Bradway's Estate, 1 Ashm. 212.

inserted or retained by inadvertence or mistake, and so to give the instrument an actual character altogether different from its apparent character. Undoubtedly if a clause is inserted or retained by inadvertence or mistake and against the intention of the parties, it may be reformed, and upon reformation will be relieved of its vicious taint, and be valid as to the creditors assailing it. But without such rectification the instrument must stand or fall upon the character impressed upon its face by the parties, and by them sent out upon the world as expressing the contract and purpose of the parties to it.[1]

Construed Strictly.—Assignments are often made the means of fraud, and are not regarded in the courts with special favor.[2] Courts, however, are under no obligation to be astute to destroy them.[3] The legal intendments are all in favor of their validity, the same as of other instruments.[4] The same fair and reasonable rules of construction must be applied to them as are adopted in ascertaining the meaning of other instruments.[5]

Onus Probandi.—The *onus* is upon the creditor who assails an assignment to show that it is in plain violation of the law.[6] It is a universal rule in the construction of all deeds that fraud is never to be presumed. The reason of the rule rests upon such plain principles of justice and

[1] August v. Seeskind, 6 Cold. 166; Hooper v. Tuckerman, 3 Sandf. 311; Farrow v. Hayes, 51 Md. 498.

[2] Heacock v. Durand, 42 Ill. 230; Stewart v. English, 6 Ind. 176.

[3] Read v. Worthington, 9 Bosw. 617.

[4] Turner v. Jaycox, 40 Barb. 164; s. c. 40 N. Y. 470; Townsend v. Stearns, 32 N. Y. 209; Read v. Worthington, 9 Bosw. 617.

[5] Whipple v. Pope, 33 Ill. 334.

[6] Townsend v. Stearns, 32 N. Y. 209; Kreese v. Prindle, 8 Oregon, 158.

propriety, that it needs not the force of argument or the weight of authority to support it. The party that charges fraud is bound to prove it, and that too by legal and competent evidence. This evidence may be found in the deed itself, or it may be established by other affirmative proof. But still, in both cases fraud either actual or constructive must be brought to light with reasonable certainty, and shown to be fairly applicable to the agreement sought to be impeached. Mere conjecture or surmise, however probable or persuasive, is never allowed to establish fraud.[1] Where an instrument is ambiguous in its terms and admits of two constructions, that interpretation should be given to it which will render it legal and operative rather than that which will render it illegal and void.[2] If mere words are relied on as the sole evidence of guilt, it is not enough that they admit of a construction consistent with the imputed wrong, unless they are inconsistent also with a lawful act and an honest purpose.[3] It is not, moreover, by selecting isolated words, inadvertently used, and giving them their most unfavorable construction, that fraud is to be imputed. The whole tenor of the instrument is to be taken into view in pronouncing upon its general character.[4]

No Inference that Debtor contemplated a Violation of the Trust.—The trust, like all others confided to human hands, is liable to abuse, but this is no argument

[1] *Ex parte* Conway, 12 Ark. 302.

[2] Grover v. Wakeman, 11 Wend. 187; s. c. 4 Paige, 23; Bank v. Talcott, 22 Barb. 550; Darling v. Rogers, 22 Wend. 483; s. c. 7 Paige, 272; Jewett v. Woodward, 1 Edw. 195; Rapalee v. Stewart, 27 N. Y. 310; Whipple v. Pope, 33 Ill. 334; Booth v. McNair, 14 Mich. 19; Townsend v. Stearns, 32 N. Y. 209; Shackleford v. Planters' Bank, 22 Ala. 238.

[3] Townsend v. Stearns, 32 N. Y. 209.

[4] Bringham v. Tillinghast, 15 Barb. 618; s. c. 13 N. Y. 215.

against its validity.[1] The law will not defeat an instrument by inferring that the debtor contemplated an illegal act on the part of the assignee.[2] It presumes that the assignee will apply a general power which can have a lawful operation to a lawful purpose. When the provision is susceptible of an honest application, it can not be said to have that necessary evil tendency which justifies the inference of a fraudulent intent.[3] The question, therefore, in construing an assignment, is not whether a fraud may be committed by the assignee, but whether the provisions of the instrument are such that, when carried out according to their apparent and reasonable intent, they will be fraudulent in their operation. It is only when the authority is express to do an illegal act that the instrument will be held void.[4] For the same reason the possibility of a mistake or misapprehension on the part of the assignee will not warrant the total abrogation of an instrument.[5]

Powers that may not be Operative.—A power will not be implied in order to overturn an instrument. The reservation of a supposed existing right will not be construed into the grant of a power.[6] But if there is a stipulation in the deed which makes it fraudulent in law, the court will not look to the circumstances of the case to ascertain whether it can ever become operative.[7] It is

[1] *Ex parte* Conway, 12 Ark. 302; Ward v. Tingley, 4 Sandf. Ch. 476; Hoffman v. Mackall, 5 Ohio St. 124.

[2] Kellogg v. Slauson, 11 N. Y. 302; s. c. 15 Barb. 56.

[3] Watkins v. Wallace, 19 Mich. 57.

[4] Kellogg v. Slauson, 11 N. Y. 302; s. c. 15 Barb. 56; Brigham v. Tillinghast, 15 Barb. 618; s. c. 13 N. Y. 215; Ward v. Tingley, 4 Sandf. Ch. 476; Berry v. Hayden, 7 Iowa, 469; Norton v. Kearney, 10 Wis. 443.

[5] Eyre v. Beebe, 28 How. Pr. 333.

[6] Van Nest v. Yoe, 1 Sandf. Ch. 4.

[7] Boardman v. Halliday, 10 Paige, 223; Sheldon v. Dodge, 4 Den. 217.

likewise immaterial that a power is contingent, and that no occasion has arisen for its operation. The question is, what does it enable the debtor to accomplish, and the law presumes that he intends all that the instrument provides.[1] The mere fact that two provisions independent in their nature are found in the same instrument can never avail to stamp upon them or either of them the character of fraud when the provisions separately construed are admitted to be lawful.[2]

Rule of Construction.—The safe rule of construction is to regard every assignment which operates to delay creditors for any purpose whatever not distinctly calculated to promote their interests, as contrary to the policy of the statute.[3]

Law of State where Made.—The fact that an instrument can not be enforced in another State is no reason why it should not be enforced by the courts of the State where it is made. To allow the laws of other States to control the legality of the acts and contracts of its own citizens in their domestic operations would violate every principle of governmental independence. Lawful acts done within one State can not be made unlawful by provisions having no authority beyond the territory of the State adopting them. If no assignment were valid which would not be valid wherever the debtor had property, there would be few valid assignments. The only ground which a court can have for setting aside an assignment made in the State where the court sits is because it vio-

[1] Grover v. Wakeman, 11 Wend. 187; s. c. 4 Paige, 23; Mead v. Phillips, 1 Sandf. Ch. 83.

[2] Nicholson v. Leavitt, 4 Sandf. 252; s. c. 6 N. Y. 510; s. c. 10 N. Y. 591. [3] Grover v. Wakeman, 11 Wend. 187; s. c. 4 Paige, 23.

lates the laws of that State, and those laws can not be violated by a disregard of any but their own policy, and the court has no call or jurisdiction to enforce any external or foreign policy.[1]

CONTEMPORANEOUS CIRCUMSTANCES.—It is not sufficient to invalidate an assignment that the debtor at the time of making it is embarrassed,[2] or executes it voluntarily,[3] or without the request or knowledge of the creditors.[4] It is not necessary that the creditors shall be consulted, or that the fact shall appear upon the face of an assignment.[5] An assignment may convey all the debtor's property,[6] but will not be void if it does not do so.[7] An assignment by a firm need not convey the separate estates of the partners.[8]

SOLVENT DEBTOR.—As assignments for the benefit of creditors are generally made by insolvent debtors, it is not unfrequently said that such dispositions of property can be made only by that class of persons. But this doctrine has no foundation in principle. These assignments are in their nature simple trusts for the payment of debts. The power to create such trusts is not peculiar to insolvent

[1] Watkins v. Wallace, 19 Mich. 57; Frink v. Buss, 45 N. H. 325.

[2] Layson v. Rowan, 7 Rob. (La.) 1.

[3] Layson v. Rowan, 7 Rob. (La.) 1.

[4] Reinhard v. Bank of Ky., 6 B. Mon. 252.

[5] Brashear v. West, 7 Pet. 608; Dance v. Seaman, 11 Gratt. 778.

[6] Layson v. Rowan, 7 Rob. (La.) 1.

[7] Meeker v. Sanders, 6 Iowa, 61; Berry v. Matthews, 13 Md. 537; Price v. De Ford, 18 Md. 489; Doremus v. Lewis, 8 Barb. 124; Wilson v. Forsyth, 24 Barb. 105; Eicks v. Copeland, 53 Tex. 581; *vide* Smith v. Woodruff, 1 Hilt. 462. When a statute requires that it shall convey all, it is sufficient if the deed by the terms of the law where it is made conveys all. Frink v. Buss, 45 N. H. 325; Watkins v. Wallace, 19 Mich. 57.

[8] Blake v. Faulkner, 18 Ind. 47; Garner v. Frederick, 18 Ind. 507; Guerin v. Hunt, 6 Minn. 375; S. C. 8 Minn. 477. *Contra*, Simmons v. Curtis, 41 Me. 373; Derry Bank v. Davis, 44 N. H. 548.

men. On the contrary, it is a power more unquestionably possessed by men who are entirely solvent. Persons of undoubted ability may dispose of their property as they please, so far as the question of power merely is concerned. This right of disposition on general principles of law and justice was never doubtful except in case of a debtor's inability to meet his engagements. It was the insolvency rather than the solvency of the debtor which suggested the doubt in regard to the right of putting the whole or any part of his property in trust for the benefit of creditors. It is undoubtedly true that a solvent as well as an insolvent person may make a fraudulent assignment. In either condition the question is one of fact, depending mainly on other circumstances where the instrument is on its face free from obnoxious provisions. In either case, if the intention is to hinder or delay creditors, the transaction is fraudulent, but that intention can not be inferred from one condition of the debtor any more than from the other.[1]

Legal Rights.—The validity of an assignment must in both cases be determined according to the respective legal rights of the debtor and the creditors. The law provides that the debtor shall fulfil his obligations, and on his default gives to the creditors a remedy for the recovery of their demands, and a sale of the property of the debtor for their payment. This is a strict legal right. The law gives to the creditors alone the right to determine whether the debtor shall have further indulgence, or whether they will pursue their remedy for the collection of their debts.

[1] Ogden v. Peters, 21 N. Y. 23; s. c. 15 Barb. 560; Angell v. Rosenberg, 12 Mich. 241. *Contra*, Van Nest v. Yoe, 1 Sandf. Ch. 4; Planck v. Schermerhorn, 3 Barb. Ch. 644; Burt v. McKinstry, 4 Minn. 204; *in re* Randall & Sunderland, 3 B. R. 18; s. c. 2 L. T. B. 69; s. c. 1 Deady, 557.

If the real object of the debtor, therefore, is to gain time, to prevent the speedy sale and conversion which an execution would inevitably accomplish, and to protect his interests in the surplus by placing the property beyond the reach of the process of the law, then, in the very language of the statute, he hinders, delays and ultimately defrauds his creditors, whatever may be the pretence under which he cloaks the act.[1]

To Prevent a Sacrifice.—Where the property of the debtor is insufficient to pay his debts, the desire to protect it from sacrifice and have it realize as much as possible is not inconsistent with fair dealing and honesty, and instead of violating the policy of the law or the rights of creditors, is in harmony with both, and exempt from the charge of fraud.[2] But where the property at the time of the assignment is much more than sufficient to satisfy all demands, the accomplishment of this object can only be at the expense of the creditors and for the benefit of the debtor. The law, however, does not tolerate such a purpose on the part of the debtor. He has no right to protect his property from sacrifice at the expense of his creditors. The latter have the right to demand their debts in full without delay where the assets of the debtor are sufficient for that purpose.[3] The true rule, therefore, is that the intent to avoid a sacrifice will invalidate an assignment when the sacrifice is sought to be prevented by the debtor

[1] Van Nest v. Yoe, 1 Sandf. Ch. 4; Planck v. Schermerhorn, 3 Barb. Ch. 644; Knight v. Packer, 12 N. J. Eq. 214; London v. Parsley, 7 Jones (N. C.) 313; Burt v. McKinstry, 4 Minn. 204; Lehmer v. Herr, 1 Duvall, 360; Holmberg v. Dean, 21 Kans. 73; Gardner v. Commercial Bank, 95 Ill. 298.

[2] Angell v. Rosenburg, 12 Mich. 241; Burt v. McKinstry, 4 Minn. 204; Ely v. Cook, 18 Barb. 612.

[3] Burt v. McKinstry, 4 Minn. 204.

himself so as to enable him to realize something by way of a surplus or otherwise,[1] but not where the sole or primary intent is to enable the creditors to realize their demands and prevent loss or injury to any one.[2]

Burden of Proving Solvency.—The burden of proving the solvency of the debtor rests upon the creditor who assails the assignment.[3] A mere nominal difference between the assets and liabilities is not sufficient, especially where the former includes debts due to the assignor at their face without reference to the question whether they are collectible.[4] Where the excess of assets is so unreasonably large as to force the conclusion that the assignment is made in the interest of the debtor, and to protect him from the sacrifice attending a forced sale, rather than for the benefit of creditors, then the assignment may be fraudulent, but the question of reasonableness or unreasonableness of the excess must depend upon a variety of circumstances, amongst which the convertibility of the assets into money is the most important.[5]

Debtor's Belief.—The debtor's belief that he is solvent is only proper evidence to consider in determining the intent with which the assignment is made.[6] It is

[1] Rokenbaugh v. Hubbell, 5 Law Rep. (N. S.) 95; s. c. 15 Barb. 563, note; Angell v. Rosenburg, 12 Mich. 241.

[2] Rokenbaugh v. Hubbell, 5 Law Rep. (N. S.) 95; s. c. 15 Barb. 563, note; Angell v. Rosenburg, 12 Mich. 241.

[3] Kellogg v. Slauson, 11 N. Y. 302; s. c. 15 Barb. 56; Haven v. Richardson, 5 N. H. 113.

[4] Livermore v. Northrop, 44 N. Y. 107; Guerin v. Hunt, 8 Minn. 477; s. c. 6 Minn. 375.

[5] Guerin v. Hunt, 8 Minn. 477; s. c. 6 Minn. 375.

[6] Bates v. Ableman, 13 Wis. 644. *Contra*, Van Nest v. Yoe, 1 Sandf. Ch. 4; Baldwin v. Buckland, 11 Mich. 389; Burt v. McKinstry, 4 Minn. 204.

susceptible of an explanation consistent with honesty of purpose. So far as it relates to the charge of actual fraud much must depend upon the strength of the belief. That might approach very near to a certainty and thus justify the inference,[1] but a belief that a surplus of only the most trifling character will remain, while without an assignment the property will be so sacrificed that a large portion of his debts will remain unpaid, furnishes very slight if any evidence of fraud.[2] The debtor may believe himself solvent, and yet have so much doubt upon the subject, from the uncertain valuation of his property, and particularly of that part of it which consists of *choses in action*, and the representation of his friends, that he may honestly suppose that an assignment will prove beneficial to his creditors.[3] He may also suppose that his property is sufficient for the payment of his debts, and yet that before he can render it available it will probably be so far reduced by hasty or forced sales, and his liabilities so far increased by the addition of costs created by anxious and competing creditors, that it will become inadequate to satisfy all his debts. Under such a supposition and in such circumstances an assignment will be valid.[4] If, moreover, he is at the time unable to pay his debts according to the usage of trade, or is unable to proceed in his business without some general arrangement with his creditors by way of extension of time of payment, then he is insolvent and

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[1] Ogden v. Peters, 21 N. Y. 23; s. c. 15 Barb. 560; Angell v. Rosenburg, 12 Mich. 241.

[2] Bates v. Ableman, 13 Wis. 644.

[3] Ogden v. Peters, 21 N. Y. 23; s. c. 15 Barb. 560; Angell v. Rosenburg, 12 Mich. 241; Ely v. Cook, 18 Barb. 612.

[4] Ogden v. Peters, 15 Barb. 560; s. c. 21 N. Y. 23; Rokenbaugh v. Hubbell, 5 Law Rep. (N. S.) 95; s. c. 15 Barb. 563, note; Bates v. Ableman, 13 Wis. 644; Angell v. Rosenburgh, 12 Mich. 241.

can rightfully make an assignment.[1] Even the belief that he is solvent when in fact he is not so will not invalidate an assignment if it is made in good faith.[2]

SELECTION OF ASSIGNEE.—The debtor may select the assignee.[3] The assignee may be a creditor[4] or a joint debtor.[5] He need not be a creditor.[6] He may be a relative.[7] An assignment from one partner to another of the partnership property to secure the payment of the partnership debts would be a palpable attempt on their part to keep the property under their own control, for unless there is a surplus the assignor would have no interest in the partnership effects which could pass by the assignment so as to give any greater interest to the assignee than he before possessed.[8] A corporation may select its president.[9] The reservation of the power to fill any vacancy that may occur is valid, for it is simply designed to keep the trust alive and in active operation,[10] but a power to remove the assignee gives a control over him, and holds him in obedience to the debtor, and is equivalent to a power on the part of the debtor to control

[1] Savery v. Spaulding, 8 Iowa, 239.

[2] Savery v. Spaulding, 8 Iowa, 239. *Contra*, Van Nest v. Yoe, 1 Sandf. Ch. 4; Burt v. McKinstry, 4 Minn. 204.

[3] Wilt v. Franklin, 1 Binn. 502; Nicholls v. McEwen, 17 N. Y. 22; s. c. 21 Barb. 65; *vide* Burd v. Smith, 4 Dall. 76.

[4] *Ex parte* Conway, 12 Ark. 302; Wooster v. Stanfield, 11 Iowa, 128; Frink v. Buss, 45 N. H. 325; Schultz v. Hoagland, 85 N. Y. 464.

[5] Wooster v. Stanfield, 11 Iowa, 128.

[6] Wilt v. Franklin, 1 Binn. 502; U. S. Bank v. Huth, 4 B. Mon. 423; Repplier v. Buck, 5 B. Mon. 96.

[7] Winchester v. Crandall, 1 Clarke, 371; Baldwin v. Buckland, 11 Mich. 389; Schultz v. Hoagland, 85 N. Y. 464.

[8] Sewall v. Russell, 2 Paige, 175. [9] Pope v. Brandon, 2 Stew. 401.

[10] Robins v. Embry, 1 S. & M. Ch. 207; Vansands v. Miller, 24 Conn. 180; *vide* Planck v. Schermerhorn, 3 Barb. Ch. 644.

and direct the administration of the whole trust fund, and therefore renders the assignment void.[1]

ASSIGNEE'S QUALIFICATIONS. — Although a failing debtor may select his own trustee, he has no right to vest his estate in improper or unworthy persons, and thus jeopardize the rights of creditors. It is his duty as an honest man to select such a person as will afford a reasonable assurance to the creditors that the fund will be safe in his hands.[2] The assignee must be a man qualified and competent to discharge the duties of the trust which he is to assume, and of sufficient character and pecuniary ability to afford the assurance that the trust will be faithfully and honorably administered.[3] To prevent abuse of the right of selection, and to avoid its being made a convenient engine of fraud, the utmost good faith is required of the debtor. The selection must be made with reference to the interests of the creditors, rather than that of the debtor. Hence, if the assignee is so deficient in age, health,[4] business capacity,[5] or standing, pecuniary responsibility,[6] or character for integrity,[7] that a prudent man honestly looking to the interests of the creditors alone would not be likely to select him as a proper person for the performance of the trust, then his selection will furnish an inference more or less strong according to the

[1] Robins v. Embry, 1 S. & M. Ch. 207.

[2] Reed v. Emery, 8 Paige, 417.

[3] Cram v. Mitchell, 1 Sandf. Ch. 251.

[4] Currie v. Hart, 2 Sandf. Ch. 353; Cram v. Mitchell, 1 Sandf. Ch. 251.

[5] Cram v. Mitchell, 1 Sandf. Ch. 251; Guerin v. Hunt, 6 Minn. 375; s. c. 8 Minn. 477; Walker v. Adair, 1 Bond, 158.

[6] Reed v. Emery, 8 Paige, 417; Haggarty v. Pittman, 1 Paige, 298; Connah v. Sedgwick, 1 Barb. 210; Angell v. Rosenburg, 12 Mich. 241; Jennings v. Prentice, 39 Mich. 421.

[7] Clark v. Groom, 24 Ill. 316; Holmberg v. Dean, 21 Kans. 73.

circumstances that the debtor, in making the selection, is actuated by some other motive than the desire to promote the interests of the creditors. This inference will be strengthened if the assignee is a clerk or near relative,[1] or a person likely to be easily influenced by the debtor, as this will tend to raise a presumption that the assignment is intended to be used for the debtor's benefit, or that there is some secret trust in his behalf,[2] or that there is an intention to place the property beyond the reach of the creditors.[3]

Non-residence,[4] blindness,[5] want of learning,[6] conflicting interests,[7] and insolvency,[8] are regarded as disqualifications. In respect to the latter, the principle is not confined to actual insolvency, but extends to any case where the property or pecuniary means of the assignee are clearly inadequate to afford a proper responsibility, or to any state of pecuniary embarrassment likely to deprive the creditors of this security.[9] A subsequent insolvency is not sufficient, for it must be an insolvency existing at the time of the

[1] Lehmer v. Herr, 1 Duvall, 360.

[2] Angell v. Rosenburg, 12 Mich. 241.

[3] Reed v. Emery, 8 Paige, 417. Assignments are frequently made to the confidential friends or connections of the assignor, and the property kept by the trustees for their own personal use, but more generally for the use of the assignor, and hence it becomes a convenient way in which debtors in failing circumstances are enabled to place their property out of the reach of attaching creditors, and at the same time use it for their own purposes. The difficulty of making even responsible trustees account to creditors is so great as usually to prevent their attempting it, and it is of course never attempted in the more common case where the trustee is not responsible. Feers v. Lyon, 21 Conn. 604.

[4] Cram v. Mitchell, 1 Sandf. Ch. 251; Cox v. Platt, 32 Barb. 126; s. c. 19 How. Pr. 121.

[5] Cram v. Mitchell, 1 Sandf. Ch. 251.

[6] Cram v. Mitchell, 1 Sandf. Ch. 251; Guerin v. Hunt, 6 Minn. 375; s. c. 8 Minn. 477.

[7] Hays v. Doane, 11 N. J. Eq. 84.

[8] Angell v. Rosenburg, 12 Mich. 241; Holmberg v. Dean, 21 Kans. 73.

[9] Angell v. Rosenburg, 12 Mich. 241.

execution of the assignment.[1] The insolvency of the assignee must, however, be known to the debtor in order to invalidate the assignment.[2] His general reputation in the neighborhood where he resides, and among men whose dealings and interest prompt them to observation and inquiry, may be shown for the purpose of proving such knowledge.[3] The fact that the assignee is required to give bond for the faithful performance of the trust does not relieve the debtor from the obligation of exercising prudence in making the selection.[4]

MERELY A BADGE.—The existence of disqualifications is presumptive, but not conclusive evidence of fraud. The intent of the debtor is to be ascertained, not by any one fact or circumstance, but by every fact and circumstance that may throw light upon the transaction.[5] Thus, in the case of insolvency, the high character of the assignee for integrity and business capacity may sometimes compensate in a great measure, if not entirely, for his want of pecuniary means, and afford nearly, if not quite as strong assurance to creditors that the funds will be safe in his hands and that the trusts will be faithfully executed.[6]

AGREEMENT NOT TO RECORD.—An agreement after the execution of an assignment not to put it on record for a few days does not vitiate the assignment. The fact con-

[1] Jackson v. Cornell, 1 Sandf. Ch. 348.

[2] Browning v. Hart, 6 Barb. 91.

[3] Angell v. Rosenburg, 12 Mich. 241.

[4] Holmberg v. Dean, 21 Kans. 73.

[5] Reed v. Emery, 8 Paige, 417; Wilson v. Ferguson, 10 How. Pr. 175; Pearce v. Beach, 12 How. Pr. 404; Clark v. Groom, 24 Ill. 316; Guerin v. Hunt, 6 Minn. 375; S. C. 8 Minn. 477; Angell v. Rosenburg, 12 Mich. 241.

[6] Angell v. Rosenburg, 12 Mich. 241; Pearce v. Beach, 12 How. Pr. 404; Clark v. Groom, 24 Ill. 316.

nected with others may be some evidence of actual fraud, but it does not establish a secret agreement under which there is a reservation of any benefit to the grantor.[1]

CHANGE OF POSSESSION.—It is not necessary that a change of possession should accompany the transfer.[2] The assignee may, for his own accommodation, permit the debtor to remain in possession, especially if the creditors consent.[4] The retention of possession is, however, a badge of fraud.[5] The assignee may also employ the debtor as his agent when such employment is not a condition of executing the assignment, nor the result of a prior positive engagement.[6] Mere expectation on the part of the debtor

[1] Hoopes v. Knell, 31 Md. 550; M'Kinney v. Rhoads, 5 Watts, 343; *in re* John C. Walker, 18 N. B. R. 56; *vide* Hafner v. Irwin, 1 Ired. 490.

[2] Mitchell v. Willock, 2 W. & S. 253; Fitler v. Maitland, 5 W. & S. 307; Dallam v. Fitler, 6 W. & S. 323; Cameron v. Montgomery, 13 S. & R. 128; Vernon v. Morton, 8 Dana, 247; Walters v. Whitlock, 9 Fla. 86; Strong v. Carrier, 13 Conn. 319; Osborne v. Tuller, 14 Conn. 529; Klapp v. Shirk, 13 Penn. 589; Caldwell v. Rose, 1 Smith, 190; Caldwell v. Williams, 1 Ind. 405; Moore v. Smith, 35 Vt. 644; State v. Benoist, 37 Mo. 500. *Contra*, Hower v. Geesaman, 17 S. & R. 251; Dewey v. Adams, 4 Edw. Ch. 21; Hart v. Gedney, 1 Law Rep. 69; Ingraham v. Wheeler, 6 Conn. 277.

[3] Vredenburg v. White, 1 Johns. Cas. 156.

[4] Scott v. Ray, 35 Mass. 360.

[5] Van Nest v. Yoe, 1 Sandf. Ch. 4; Hitchcock v. St. John, 1 Hoff. 511; Forbes v. Logan, 4 Bosw. 475; Ball v. Loomis, 29 N. Y. 412; Jacobs v. Remsen, 36 N. Y. 668; Livermore v. Northrop, 44 N. Y. 107; Boyden v. Moore, 28 Mass. 362; Vernon v. Morton, 8 Dana, 247; Pitts v. Viley, 4 Bibb, 446; Cummings v. McCullough, 5 Ala. 324; Byrd v. Bradley, 2 B. Mon. 239; Strong v. Carrier, 13 Conn. 319; Wright v. Linn, 16 Tex. 34; Flanigan v. Lampman, 12 Mich. 58; Terry v. Butler, 43 Barb. 395; Van Hook v. Walton, 28 Tex. 59; Stewart v. Kerrison, 3 Rich. (N. S.) 266; Higby v. Ayres, 14 Kans. 331.

[6] Browning v. Hart, 6 Barb. 91; Nicholson v. Leavitt, 4 Sandf. 252; s. c. 6 N. Y. 510; s. c. 10 N. Y. 591; Ogden v. Peters. 15 Barb. 560; s. c. 21 N. Y. 23; Rockenbaugh v. Hubbell, 5 Law Rep. (N. S.) 95; s. c. 15 Barb. 563, note; Pearson v. Rockhill, 4 B. Mon. 296; Tompkins v.

that he will be employed is not sufficient to invalidate an assignment.[1] Such employment is, however, a badge of fraud.[2] In all cases where the debtor is left in possession, it is imperative for the party supporting the validity of the transaction to prove that the assignment was executed in good faith and without any intent to defraud.[3] If there is no change in the course of the business after the execution of the assignment, it is a badge of fraud.[4] If there is an agreement at the time of the execution of the assignment that the debtor may lease the property, and this agreement is carried out, the assignment will be deemed fraudulent.[5]

DEBTOR'S ADVICE.—Every insolvent debtor has at least a moral interest in the advantageous disposition of the property, in order that it may go as far as possible in the payment of his debts and the satisfaction of his creditors,

Wheeler, 16 Pet. 106; Casey v. Janes, 37 N. Y. 608; Gordon v. Cannon, 18 Gratt. 387; Beamish v. Conant, 24 How. Pr. 94; Wilbur v. Fradenburgh, 52 Barb. 474; Fitler v. Maitland, 3 W. & S. 307; Van Hook v. Walton, 28 Tex. 59; Blow v. Gage, 44 Ill. 208; Baldwin v. Buckland, 11 Mich. 389; Deckard v. Case, 5 Watts, 22; Vernon v. Morton, 8 Dana, 247; Shattock v. Freeman, 42 Mass. 10; Forbes v. Scannell, 13 Cal. 242; Savery v. Spaulding, 8 Iowa, 239; Hubbard v. Winborne, 4 Dev. & Bat. 137; Hall v. Wheeler, 13 Ind. 371; Olney v. Tanner, 10 Fed. Rep. 171.

[1] Ogden v. Peters, 15 Barb. 560; s. c. 21 N. Y. 23; Nicholson v. Leavitt, 4 Sandf. 252; s. c. 6 N. Y. 510; s. c. 10 N. Y. 591. In Connecticut the debtor can not be employed before the inventory is returned to the court of probate. Peck v. Whiting, 21 Conn. 206.

[2] Jackson v. Cornell, 1 Sandf. Ch. 348; Wilson v. Ferguson, 10 How. Pr. 175; Connah v. Sedgwick, 1 Barb. 210; Linn v. Wright, 18 Tex. 317; Guerin v. Hunt, 6 Minn. 375; s. c. 8 Minn. 477.

[3] Mead v. Phillips, 1 Sandf. Ch. 83; Cram v. Mitchell, 1 Sandf. Ch. 251.

[4] Wilson v. Ferguson, 10 How. Pr. 175; Connah v. Sedgwick, 1 Barb. 210; Cummings v. McCullough, 5 Ala. 324; Adams v. Davidson, 10 N. Y. 309; Pine v. Rikert, 21 Barb. 469; Moffat v. Ingham, 7 Dana, 495; Smith v. Leavitts, 10 Ala. 92.

[5] Dobson v. Kerr, 12 N. Y. Supr. 643.

and therefore any suggestion offered by him which may be useful to the assignee and beneficial to the creditors, so far from showing that he intended by the assignment to defraud his creditors, indicates that he was actuated by good motives from the beginning.[1]

Power of Revocation.—The debtor must part with the property free from any control over or interference with it, and from any contingency on which he may or may not resume it at his pleasure.[2] A personal trust to the assignee to terminate upon his death or resignation, with full power to resign, renders the assignment fraudulent.[3] But a conveyance to the assignee and his successors in trust does not give the power to appoint the successors. It merely refers to such persons as may lawfully succeed the assignee in case of resignation, removal or death.[4] When a power of revocation is reserved to the debtor, the necessary inference is that the assignment is made with the intent to delay, hinder or defraud creditors, for its only effect is to mask the property,[5] even though it is only to be exercised in case any creditor refuses to assent to the assignment.[6] A power to make loans on the security of the estate is equivalent to a power of revocation.[7]

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[1] Eyre v. Beebe, 28 How. Pr. 333.

[2] Whallon v. Scott, 10 Watts, 237; *vide* Hafner v. Irwin, 1 Ired. 490; Dana v. Bank of U. S., 5 W. & S. 223; Planters and Merchants' Bank v. Clarke, 7 Ala. 765; Janney v. Barnes, 11 Leigh, 100; Sheppards v. Turpin, 3 Gratt. 373.

[3] Smith v. Hurst, 10 Hare, 30; s. c. 22 L. J. Ch. (N. S.) 289; s. c. 17 Jur. 30; s. c. 15 Eng. L. & Eq. 520.

[4] Langdon v. Thompson, 25 Minn. 509.

[5] Riggs v. Murray, 15 Johns. 571; s. c. 2 Johns. Ch. 565; Cannon v. Peebles, 4 Ired. 204; s. c. 2 Ired. 449.

[6] Hyslop v. Clark, 14 Johns. 458.

[7] Sheppards v. Turpin, 3 Gratt. 373.

POWER TO SUBSEQUENTLY DECLARE THE USES.—Every assignment is absolutely void if it does not appoint and declare the uses for which the property is to be held and to which it is to be applied. A provision that the uses shall be subsequently declared by the debtor will not do. They must accompany the instrument and appear on its face, in order to rebut the conclusive presumption of a fraudulent intent, which would otherwise arise.[1] The reason is manifest. If an assignment reserves to the debtor the right to declare or change the uses at some subsequent time, the creditors can never know what their rights are, so as to render it safe for them to attempt to assert those rights in any suit or proceeding either at law or in equity. For if any of such creditors should institute a suit to compel the assignee to account and pay over the trust fund as directed by the assignment, the debtor would unquestionably exercise the discretion of preferring other creditors to him, and no prudent man would subject himself to the costs of a fruitless litigation under such an assignment for his pretended benefit.

The effect of such an assignment, therefore, is to place the creditors directly within the power of the debtor, and to compel them to acquiesce in such terms as he may think proper to prescribe as the only condition upon which they can get any part of the proceeds of the property of their debtor. It furnishes the means for inducing them to relinquish a part of their claims or to refrain from enforcing them against the trust fund. It enables the debtor to set his creditors at defiance, and compel them to bid against each other for his favor. To place them in such a situation is clearly a fraud upon

[1] Grover v. Wakeman, 11 Wend. 187; s. c. 4 Paige, 23; Harvey v. Mix, 24 Conn. 406; Burbank v. Hammond, 3 Sumner, 429.

them, and must necessarily hinder and delay them in the collection of their debts.[1] So long, therefore, as the debtor is permitted to make an assignment of his property in trust for the payment of his debts without consulting his creditors on the subject, it is absolutely necessary for the protection of their rights that the equitable interests in the assigned property shall be fixed and determined by the assignment itself.[2] The limitation of the right to declare the uses to a certain period does not obviate the objection. The law requires that the assignment must itself fix and determine the rights of the creditors in the assigned property. The principle is the same whether the debtor reserves the right to determine the preferences to be given within sixty days, six months, or three years.[3]

SUBSEQUENT SCHEDULES.—The effect of a provision that the debtor may at a future period prepare and annex schedules of the debts, giving preferences to the creditors, is substantially to confer upon him the right to give future preferences among his creditors, and consequently renders the deed fraudulent.[4] Even if the schedules are prepared and annexed subsequently, the assignment can not be considered valid even from the time when such schedules are annexed. If the assignment is fraudulent and void when executed, it can not be rendered valid and operative by any subsequent act of the debtor performed in the execution of a fraudulent power.[5]

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[1] Boardman v. Halliday, 10 Paige, 223; Barnum v. Hempstead, 7 Paige, 568; Gazzam v. Poyntz, 4 Ala. 374.

[2] Averill v. Loucks, 6 Barb. 470; Mitchell v. Styles, 13 Penn. 306.

[3] Averill v. Loucks, 6 Barb. 470. [4] Averill v. Loucks, 6 Barb. 470.

[5] Averill v. Loucks, 6 Barb. 470; Mitchell v. Styles, 13 Penn. St. 306; *vide* Hotop v. Neidig, 17 Abb. Pr. 332.

POWER TO GIVE SUBSEQUENT PREFERENCES CAN NOT BE GIVEN TO ANOTHER.—As the debtor can not reserve the power to himself of giving a preference, he can not legally confer it on the assignee. The same objection in principle exists in both cases. A discretionary power, therefore, in the assignee to pay off or discharge any of the claims in preference to other debts provided for in the assignment, renders the instrument void.[1] When the right depends upon a contingency, the fact that the creditors who may be postponed will not be injured is immaterial, for no future event can make a conveyance valid which contains illegal provisions.[2] The principle does not apply to a clause constituting the creditors who may notify the assignee before a certain day a third class in order of payment.[3] A direction to the assignee to pay such other debts as the debtor may thereafter specify out of any surplus which may be left after paying all the debts named in the instrument does not vitiate it.[4]

FICTITIOUS DEBTS.—An appropriation of the property to the payment of debts not owing by the assignor and not contracted on his account,[5] or for a larger sum than is

[1] Barnum v. Hempstead, 7 Paige, 568; Boardman v. Halliday, 10 Paige, 223; Strong v. Skinner, 4 Barb. 546; Sheldon v. Dodge, 4 Denio, 217; Gazzam v. Poyntz, 4 Ala. 374; Smith v. Hurst, 10 Hare, 30; s. c. 15 Eng. L. & Eq. 520; s. c. 17 Jur. 30; 22 L. J. Ch. (N. S.) 289.

[2] Sheldon v. Dodge, 4 Denio, 217.

[3] Ward v. Tingley, 4 Sandf. Ch. 476; it has been held that a provision that a certain sum under the direction of the debtor shall be paid to other creditors is good. Graham v. Lockhart, 8 Ala. 9. And that a provision that the debtor shall be at liberty to direct other creditors to be paid in like manner as those provided for in the assignment is good. Cannon v. Peebles, 2 Ired. 449; s. c. 4 Ired. 204.

[4] Hall v. Wheeler, 13 Ind. 371.

[5] Henderson v. Haddon, 12 Rich. Eq. 393; Bank v. Talcott, 22 Barb. 550; Overton v. Holinshade, 5 Heisk. 283.

due,[1] to the prejudice of his creditors, is evidence of fraud. This will not, however, make the assignment void unless the assignee participate in the fraud.[2] No creditor is concluded by taking under the assignment from impeaching any of the debts attempted to be secured by it, and showing fraud and collusion in such of them as may stand in his way and the payment of which would operate to his prejudice.[3] The impeached claim is extinguished by the fraud, and the share that would otherwise have been appropriated to its payment sinks into the residue, for the benefit of those who are entitled to the residue by the terms of the deed.[4] The mere statement that notes are made by a third person does not justify the inference that the assignor is not under obligation to pay them,[5] nor is a court authorized to judicially know that the person named in the schedule is the assignor although the names are identical.[6] Relationship does not authorize the conclusion that a debt is not a fair one in the absence of evidence that it is fraudulent. A direction to the assignee to pay

[1] Bank v. Fink, 7 Paige, 87; American Exchange Bank v. Webb, 15 How. Pr. 193; s. c. 36 Barb. 291; Angell v. Rosenburg, 12 Mich. 241; Kavanaugh v. Beckwith, 44 Barb. 192; Hastings v. Baldwin, 17 Mass. 552; Guerin v. Hunt, 6 Minn. 375; s. c. 8 Minn. 477.

[2] Macintosh v. Corner, 33 Md. 598; Hempstead v. Johnston, 18 Ark. 123; Hardcastle v. Fisher, 24 Mo. 70; Harris v. De Graffenreid, 11 Ired. 89; Pinneo v. Hart, 30 Mo. 561; Nightingale v. Harris, 6 R. I. 321; Starr v. Dugan, 22 Md. 58; Woodward v. Marshall, 39 Mass. 468; Craft v. Bloom, 59 Miss. *Contra*, Fiedler v. Day, 2 Sandf. 594; Planck v. Schermerhorn, 3 Barb. Ch. 644; Webb v. Daggett, 2 Barb. 9; Irwin v. Keen, 3 Whart. 347; American Exchange Bank v. Webb, 15 How. Pr. 193; s. c. 26 Barb. 291; Mead v. Phillips, 1 Sandf. Ch. 83; Jacobs v. Remsen, 36 N. Y. 668; Livermore v. Northrop, 44 N. Y. 107; Terry v. Butler, 43 Barb. 395; Lehmer v. Herr, 1 Duvall, 360; Stone v. Marshall, 7 Jones (N. C.) 300.

[3] Macintosh v. Corner, 33 Md. 598; Starr v. Dugan, 22 Md. 58; Hardcastle v. Fisher, 24 Mo. 70; Reiff v. Eshleman, 52 Md. 582.

[4] Hardcastle v. Fisher, 24 Mo. 70. [5] Bank v. Talcott, 22 Barb. 550.

[6] Blow v. Gage, 44 Ill. 208. [7] Layson v. Rowan, 7 Rob. (La.) 1.

the debts of the assignor, though equivocal, means debts owing by him.[1] Although an assignment provides for the payment of a fee to the attorney for his services in advising and preparing it, yet that is not sufficient to sustain it if it provides for the payment of a fictitious debt.[2]

REAL DEBTS.—A provision may be made for the payment of a note given for an obligation to which the statute of frauds would have been a good defense, for it is optional with the debtor whether he will set up the defense or not,[3] but no provision can be made for a claim which has been discharged by a release from the creditor. The moral obligation is not sufficient in such a case to support the demand as against other creditors.

DEBTOR'S WIFE.—Whenever the debtor has received or borrowed the property of his wife, under circumstances which in a court of equity would be regarded as creating a debt to her from him, and as entitling her to be considered and treated as his creditor therefor, he is allowed to pay such debt from his property, in the same manner and upon the same principles upon which he is allowed to pay any other debt to any other creditor. The temptation which may exist in such cases for the perpetration of frauds for the benefit of the debtor's family, makes it proper to scrutinize very closely and carefully all transactions between the husband and wife, to see that claims in favor of the wife are not trumped up on the eve of insolvency. The pre-existence of the debt must be very clearly proved, and its honesty most fully established,

[1] Pine v. Rikert, 21 Barb. 469.
[2] Craft v. Bloom, 59 Miss.
[3] Livermore v. Northrop, 44 N. Y. 107.
[4] Nightingale v. Harris, 6 R. I. 321.

before it is allowed. But if honest, the debt of the wife is none the less sacred because it is due from her husband.[1] A provision may also be made for the payment of a mortgage for the purpose of restoring her inchoate right of dower in the mortgaged premises discharged of the mortgage. As between the creditors themselves the mortgaged property is the primary fund for paying the mortgage debt, but as against all creditors, except the mortgage creditor, the equity of the wife is entitled to as much consideration as their demands.[2]

SURETIES.—The debtor has the undoubted right to provide for the payment of any legal obligation. Hence, an assignment may provide for sureties and indorsers as well as creditors.[3] The holders and owners of the claims designed to be protected may compel an appropriation of the assigned property to their payment, and consequently the provision has the same effect as if the holders were named the *cestuis que trust* in the instrument.[4] The fact that the liability is contingent does not constitute a valid objection, for an assignment to protect a contingent liability no more hinders or delays creditors than one to pay a debt not yet due, even if the assignee is not authorized to pay such debt before its maturity, for the assignee has a right to retain sufficient funds in his hands to meet such liability, and distribute the residue, and after the liability

[1] McCartney v. Welch, 44 Barb. 271; s. c. 51 N. Y. 626; Planck v. Schermerhorn, 3 Barb. Ch. 644; Jaycox v. Caldwell, 51 N. Y. 395; s. c. 37 How. Pr. 240. [2] Dimon v. Delmonico, 35 Barb. 554.

[3] Keteltas v. Wilson, 36 Barb. 298; s. c. 23 How. Pr. 69; Copeland v. Weld, 8 Me. 411; Duval v. Raisin, 7 Mo. 449; Vaughan v. Evans, 1 Hill Ch. 414; Bank v. Talcott, 22 Barb. 550; Halsey v. Whitney, 4 Mason, 206; Stevens v. Bell, 6 Mass. 339; Bank v. Cox, 6 Me. 395; Cunningham v. Freeborn, 11 Wend. 241; s. c. 1 Edw. 256; s. c. 3 Paige, 537.

[4] Griffin v. Marquardt, 21 N. Y. 121; s. c. 17 N. Y. 28.

is disposed of distribute the balance.[1] A direction to the assignee to indemnify a surety is a direction to pay the obligation as it becomes due, for in no other way can the guarantor be fully protected and saved harmless from the payment thereof.[2]

SECURED DEBTS.—A provision for the payment of a debt which has been previously secured by either a judgment or a mortgage, or otherwise, does not affect the validity of the assignment. If it is paid out of the assigned estate, the property upon which it is a lien will be left without hindrance to be resorted to by the other creditors for the payment of their debts. If the debt is imperfectly secured, it is not objectionable to provide for it in the assignment. If it is amply secured, a provision for its payment will not render the assignment void.[3] But such a provision should be considered as made subject to the equity, as between the creditors, to have the mortgage debt paid out of the mortgaged property.[4] An assignment may provide for the payment of a debt which is secured by a lien on the homestead, although the homestead is not conveyed to the assignee.[5] Provision may also be made for the payment of an attaching creditor, provided his attachment is sustained. The fact that it is conditional and contingent is immaterial, for it could not be otherwise when the validity of the attachment is questioned.[6] It is proper for the assignment to set forth the securities held by the secured creditor, but the

[1] Read v. Worthington, 9 Bosw. 617; Loeschigk v. Jacobson, 26 How. Pr. 526; s. c. 2 Robt. 645.

[2] Loeschigk v. Jacobson, 26 How. Pr. 526; s. c. 2 Robt. 645.

[3] Strong v. Skinner, 4 Barb. 546; Hastings v. Palmer, 1 Clarke, 52; Kruse v. Prindle, 8 Oregon, 158.

[4] Dimon v. Delmonico, 35 Barb. 554.

[5] Ball v. Bowe, 49 Wis. 495.

[6] Grant v. Chapman, 38 N. Y. 293.

omission of any reference to them is not inconsistent with entire honesty and good faith.[1] A debt fully secured by a mortgage may also be excluded.[2]

VARIOUS DEBTS.—Provision may be made for the payment of an unsettled account,[3] or of notes which have been purchased at a discount,[4] or of a bequest to the debtor, as executor, to employ in business and pay the profit to others, even though it is so employed by him.[5] A direction to the assignee to pay debts which are or may become due, means debts existing at the date of the assignment and to become due afterwards, and includes debts already due. The phrase "may become due," when applied to actual debts then owing to creditors, means debts which shall become payable thereafter; and when applied to persons under a contingent liability for the debtor, means sums of money which shall thereafter become payable to them by reason of such contingent liability.[6] A provision for a debt of a firm due to another firm in which all or some of the partners are interested, is valid, because partnerships are, in a modified sense, corporate bodies, and are not to be confounded with the individuals composing them. They are societies, and their assets are to be administered as the assets of an association.[7] A provision can not be made for the debts which the separate partners may have against the firm before the firm creditors are paid.[8] A

[1] Stern v. Fisher, 32 Barb. 198. [2] Cross v. Bryant, 3 Ill. 36.

[3] Reinhard v. Bank of Ky., 6 B. Mon. 252.

[4] Powers v. Graydon, 10 Bosw. 630; s. c. 25 How. Pr. 512; Low v. Graydon, 50 Barb. 414. [5] Tilford's Case, 8 Watts, 531.

[6] Read v. Worthington, 5 Bosw. 617; Brainard v. Dunning, 30 N. Y. 211; Benedict v. Huntington, 32 N. Y. 219; Butt v. Peck, 1 Daly, 83; Van Hook v. Walton, 28 Tex. 59.

[7] Fanshawe v. Lane, 16 Abb. Pr. 71; *vide* Kayser v. Heavenrich, 5 Kansas 324. [8] Goddard v. Hapgood, 25 Vt. 351.

note given to a former partner upon his withdrawal from the firm may be provided for.[1]

By Partners.—An appropriation of firm property to pay the individual debt of one of the partners is, in effect, a gift from the firm to the partner, and the attempt to assign partnership property to pay the private debts of one of the partners, before the firm debts are paid, when the firm is insolvent, affords a conclusive presumption of an actual fraudulent design on the part of the debtors.[2] It is a fraud upon the joint creditors for one partner to authorize his share of the property of the firm to be applied to the payment of a debt for which neither he nor his property is liable at law or in equity. This right of the firm creditors to priority of payment out of the firm assets can not be impaired by any consideration having reference to the amount of capital contributed by each of the individual partners.[3]

When the separate property assigned by each partner exceeds the amount of his separate debts, a direction that separate debts shall be paid out of the partnership

[1] Mattison v. Demarest, 4 Robt. 161; Blow v. Gage, 44 Ill. 208; Smith v. Howard, 20 How. Pr. 121.

[2] Wilson v. Robertson, 21 N. Y. 587; s. c. 19 How. Pr. 350; Cox v. Platt, 32 Barb. 126; s. c. 19 How. Pr. 121; Lester v. Abbott, 28 How. Pr. 488; s. c. 3 Robt. 691; Knauth v. Bassett, 34 Barb. 31; Henderson v. Haddon, 12 Rich. Eq. 393; Keith v. Fink, 47 Ill. 272; Ruhl v. Phillips, 2 Daly, 45; Heye v. Bolles, 33 How. Pr. 266; s. c. 2 Daly, 231; French v. Lovejoy, 12 N. H. 458; Kirby v. Schoonmaker, 3 Barb. Ch. 46; Hurlbert v. Dean, 2 Abb. Ap. 428; s. c. 2 Keyes, 97. In some cases it is held that the appropriation is void but the assignment valid. Nicholson v. Leavitt, 4 Sandf. 252; s. c. 6 N. Y. 510; s. c. 10 N. Y. 591; McCullough v. Somerville, 8 Leigh, 415; Read v. Baylies, 35 Mass. 497; Kemp v. Carnley, 3 Duer, 1; Nye v. Van Husan, 6 Mich. 329; Lassell v. Tucker, 5 Sneed, 1; Gordon v. Cannon, 18 Gratt. 387.

[3] Wilson v. Robertson, 21 N. Y. 587; s. c. 19 How. Pr. 350.

property will not vitiate the assignment.[1] Evidence may also be given to show that there are no individual debts, but the burden of proof rests on the parties claiming under the instrument.[2] Debts contracted in the name of one of the partners may be shown to be in reality partnership debts.[3] Partnership property may be applied to the payment of debts which are not partnership debts, but for which all the partners are bound.[4] A direction that the property shall be distributed among the creditors according to their respective equities is good, for it contemplates a distribution according to law.[5] If a partnership is dissolved in good faith and one partner takes the property and assumes the debts of the firm, he may subsequently assign the property for the payment of his individual creditors,[6] or of the creditors of any new firm of which he may become a member.[7] An appropriation of the firm property to the payment of individual debts is not, it seems, a ground for setting aside the assignment at the instance of an individual creditor, as he can not in any manner be affected by it.[8]

Separate Property to Firm Debts.—The rule that the individual property must be first applied to the pay-

[1] Van Nest v. Yoe, 1 Sandf. Ch. 4; Knauth v. Bassett, 34 Barb. 31; Hollister v. Loud, 2 Mich. 309.

[2] Hurlbert v. Dean, 2 Keyes, 97; s. c. 2 Abb. Ap. 428. *Contra*, Lester v. Abbott, 28 How. Pr. 488; s. c. 3 Robt. 691.

[3] Cox v. Platt, 32 Barb. 126; s. c. 19 How. Pr. 121; Read v. Baylies, 35 Mass. 497; Marks v. Hill, 15 Gratt. 400; Barcroft v. Snodgrass, 1 Cold. 430.

[4] Smith v. Howard, 20 How. Pr. 121.

[5] Heckman v. Messinger, 49 Penn. 465; Maennel v. Murdock, 13 Md. 264; Coakley v. Weil, 47 Md. 277.

[6] Robb v. Stevens, 1 Clarke, 192; Yearsley's Estate, 1 A. L. Reg. 636; Marsh v. Bennett, 5 McLean, 117; Price v. De Ford, 18 Md. 489; *vide* Heye v. Bolles, 2 Daly, 231; s. c. 33 How. Pr. 266.

[7] Smith v. Howard, 20 How. Pr. 121.

[8] Morrison v. Atwell, 9 Bosw. 503.

ment of the separate debts does not limit or restrict the partners in administering their own funds, for the reason that there is no recognized lien or priority of claim in favor of the several classes of creditors upon the different funds and classes of assets belonging to the debtors. Each partner is liable for the firm debts, and all the property, both partnership and individual, is pledged to the payment of the partnership as well as the individual debts, and all that creditors can demand is that the property shall be appropriated to the payment of debts, and it is no fraud to pay one class instead of another. The debts provided for in an assignment of the individual property may be those for which he is liable jointly with others, or severally and alone. The only question is whether he is liable, and if so, the appropriation can not be fraudulent.[1] The only right of the private creditor in such a case is to compel the partnership creditors to resort first to the partnership funds until they exhaust them.

Disposition of Surplus by Partners.—When an assignment devotes the individual and partnership property to the payment of the partnership debts, and provides for a distribution of the surplus among the separate creditors, it should direct a distribution to be made according to the respective rights of the separate creditors, for an appropriation without such discrimination will render the deed fraudulent, because it authorizes the property of an insolvent debtor to be applied in part to the payment of the debts of another person, for which neither he nor

[1] O'Neil v. Salmon, 25 How. Pr. 246; Kirby v. Schoonmaker, 3 Barb. Ch. 46; Van Rossum v. Walker, 11 Barb. 237; Eyre v. Beebe, 28 How. Pr. 333; Fox v. Heath, 16 Abb. Pr. 163; s. c. 21 How. Pr. 384; Gadsden v. Carson, 9 Rich. Eq. 252; Newman v. Bagley, 33 Mass. 570; French v. Lovejoy, 12 N. H. 458; *vide* Jackson v. Cornell, 1 Sandf. Ch. 348.

his property is in anywise bound before his own just debts are satisfied.[1] Evidence may, however, be given to show that there will be no surplus after the payment of the partnership debts.[2] A direction to the assignee after the payment of the partnership debts to pay all the private and individual debts of each partner is valid, for an illegal intent is not to be implied in the absence of an express direction, and the assignee may pay the debts of each partner out of his individual property.[3]

EQUALITY.—Whenever a man becomes unable to pay his debts, the law regards his property as of right belonging to his creditors.[4] Morally he is then a trustee for all his creditors, and each is entitled to a ratable share of his property and estate. As his property in equity and justice belongs to his creditors, an assignment in favor of all his creditors equally is in conformity with the general policy of the law.[5] One of the favorite maxims of the law is that equality is equity; hence if there are no circumstances of fraud or *mala fides* attached to the transaction, the law favors rather than discourages such an act on the part of an unfortunate debtor.[6] By such a course he performs an honest act, and discharges a moral duty of which none can reasonably complain, and to which objection can seldom be made, except by such as may seek to secure their own claims at the expense of other creditors. In such case, however, the debtor does not seek to evade or

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[1] Smith v. Howard, 20 How. Pr. 121; O'Neil v. Salmon, 25 How. Pr. 246; Kitchen v. Reinsky, 42 Mo. 427.

[2] Turner v. Jaycox, 40 N. Y. 470; s. c. 40 Barb. 164. *Contra*, Smith v. Howard, 20 How. Pr. 121.

[3] Eyre v. Beebe, 28 How. Pr. 333. [4] Gere v. Murray, 6 Minn. 305.

[5] Albert v. Winn, 7 Gill. 446; s. c. 5 Md. 66; s. c. 2 Md. Ch. 169; s. c. 2 Md. Ch. 42. [6] Malcom v. Hall, 9 Gill. 177.

defeat the rights of the creditors, but to protect their interests according to the extent and character of their respective claims, and those who assail the assignment seek to draw to themselves more than their just proportion of the debtor's effects, to the prejudice of other creditors. There is, therefore, no ground to impeach the legality or fairness of such an assignment when it is made in good faith.[1]

PREFERENCES.—By virtue of the absolute dominion which a man has over his own property, he may, however, give preferences in an assignment, but preferential assignments are not encouraged. The law rather tolerates than approves them. They are inconsistent with an enlarged equity, and are therefore held to the strictest conditions. Courts watch the exercise of the right to prefer with jealousy, and are not required by any reasons of expediency or justice to enlarge it or give it dangerous facilities.[2] The right to prefer, however, has never been considered immoral or fraudulent. It was a privilege at common law, and has not been abridged by the statute. Apart

[1] State v. Bank, 6 G. & J. 205; Wilt v. Franklin, 1 Binn. 502; Meux v. Howell, 4 East. 1; Ingliss v. Grant, 5 T. R. 530; Vredenbergh v. White, 1 Johns. Cas. 156; Pickstock v. Lyster, 3 M. & S. 371; King v. Watson, 3 Price, 6; Nicoll v. Mumford, 4 Johns. Ch. 522; Vernon v. Morton, 8 Dana, 247; Robins v. Embry, 1 S. & M. Ch. 207; Adams v. Blodgett, 2 Woodb. & Min. 233; Fisher v. Dinwiddie, 12 B. Mon. 208; Evans v. Jones, 11 Jur. (N. S.) 784; s. c. 34 L. J. Exch. 25; Halsey v. Whitney, 4 Mason, 206; Hall v. Dennison, 17 Vt. 310.

[2] Murray v. Riggs, 15 Johns. 571; s. c. 2 Johns. Ch. 565; Cunningham v. Freeborn, 11 Wend. 241; s. c. 1 Edw. 256; s. c. 3 Paige, 537; American Exchange Bank v. Inloes, 7 Md. 380; Nicholls v. McEwen, 17 N. Y. 22; s. c. 21 Barb. 65; Stone v. Marshall, 7 Jones (N. C.) 300; Blow v. Gage, 44 Ill. 208.

[3] Estwick v. Caillaud, 5 T. R. 420; s. c. 2 Anst. 381; Cunningham v. Freeborn, 11 Wend. 241; s. c. 1 Edw. 256; s. c. 3 Paige, 537; Ball v. Bowe, 49 Wis. 495.

from the provisions of a bankrupt law, a debtor may, in virtue of that absolute dominion which he holds over his estate, make a *bona fide* assignment for the payment of debts with stipulations in favor of preferred creditors.[1]

[1] Beatty v. Davis, 9 Gill. 211; McColgan v. Hopkins, 17 Md. 395; Tompkins v. Wheeler, 16 Pet. 106; Marbury v. Brooks, 7 Wheat. 556; S. C. 11 Wheat. 78; Wilkes v. Ferris, 5 Johns. 335; Wynne v. Glidwell, 17 Ind. 446; Layson v. Rowan, 7 Rob. (La.) 1; Murray v. Riggs, 15 Johns. 571; S. C. 2 Johns. Ch. 565; Hatch v. Smith, 5 Mass. 42; Embry v. Clapp, 38 Geo. 245; Stevens v. Bell, 6 Mass. 339; De Forrest v. Bacon, 2 Conn. 633; Jacobs v. Remsen, 36 N. Y. 668; Putnam v. Hubbell, 42 N. Y. 106; Cameron v. Montgomery, 13 S. & R. 128; Robinson v. Rapelye, 2 Stew. 86; Wiley v. Collins, 11 Me. 193; Deaver v. Savage, 3 Mo. 252; Stevenson v. Agry, 7 Ohio, 2d part, 247; Pearson v. Rockhill, 4 B. Mon. 296; Moffatt v. M'Dowell, 1 McCord Ch. 434; M'Cullough v. Sommerville, 8 Leigh, 415; How v. Camp, Walk. Ch. 427; King v. Trice, 3 Ired. Eq. 568; *ex parte* Conway, 12 Ark. 302; U. S. Bank v. Huth, 4 B. Mon. 423; Merrick v. Henderson, Walk. 485; Cross v. Bryant, 3 Ill. 36; Smith v. Campbell, Rice, 352; Petrikin v. Davis, Morris, 296; Holbrook v. Baker, 4 Fla. 87; Hollister v. Loud, 2 Mich. 309; Kneeland v. Cowles, 4 Chand. 46; Cooper v. McClun, 16 Ill. 435; U. S. v. Bank of U. S., 8 Rob. (La.) 262; Hampton v. Morris, 2 Met. (Ky.) 336; Hempstead v. Starr, 3 Day, 340; Hower v. Geesaman, 17 S. & R. 251; M'Menomy v. Ferrers, 3 Johns. 71.

They are prohibited in the following States:—

Maine—Rev. Stat., ch. 70; Berry v. Cutts, 40 Me. 445.

New Hampshire—True v. Congdon, 44 N. H. 48.

Vermont—Act of 1852, Passumpsic Bank v. Strong, 42 Vt. 295. General assignments were formerly prohibited. Mussey v. Noyes, 26 Vt. 462; Noyes v. Hickok, 27 Vt. 36; Merrill v. Englesby, 28 Vt. 150; Bishop v. Catlin, 28 Vt. 71; Farr v. Brackett, 30 Vt. 344.

Massachusetts—Wyles v. Beals, 67 Mass. 233; Edwards v. Mitchell, 67 Mass. 239; Bowles v. Graves, 70 Mass. 117. In that State no assignment is valid. Stanfield v. Simmons, 78 Mass. 442.

Connecticut—Rev. Stat., title 14, ch. 4; Richmondville Manuf. Co. v. Pratt, 9 Conn. 487; Goodell v. Williams, 21 Conn. 419; Beers v. Lyon, 21 Conn. 604.

New Jersey—Act Apr. 16, 1846; 1 R. S. 316, Dixon's Dig. 27; Varnum v. Camp, 13 N. J. 326; Fairchild v. Hunt, 14 N. J. Eq. 367; Knight v. Packer, 12 N. J. Eq. 214. The statute does not apply to an assignment by a fraudulent grantee as a compromise with the creditors who have assailed the conveyance. Emerick v. Harlan, 12 N. J. Eq. 229.

He may assign the whole of his property for the benefit of a single creditor in exclusion of all others, or he may distribute it in unequal proportions, either among a part

Pennsylvania—Purdon's Digest, 52; Law v. Mills, 18 Penn. 185; Wiener v. Davis, 18 Penn. 331; Miners' National Bank's Appeal, 57 Penn. 193; Driesbach v. Becker, 34 Penn. 152.

Georgia—Preferences were formerly prohibited, but are not now. Lamb v. Radcliff, 28 Geo. 520; Norton v. Cobb, 20 Geo. 44; Banks v. Clapp, 12 Geo. 514; Eastman v. McAlpin, 1 Geo. 157; Cameron v. Scudder, 1 Geo. 204; Watkins v. Jenks, 24 Geo. 431; Ezekiel v. Dixon, 3 Geo. 146; Dawson v. Figuiero, 16 Geo. 610.

Alabama—Code, secs. 1555, 1556; Holt v. Bancroft, 30 Ala. 193; Price v. Mazange, 31 Ala. 701.

Kentucky—Act March 10, 1856; Rev. Stat. (Stanton) 553; Hampton v. Morris, 2 Met. (Ky.) 336.

Ohio—Rev. Stat. (S. & C.) 709; Dickson v. Rawson, 5 Ohio St. 219; Floyd v. Smith, 9 Ohio St. 546; Harkraker v. Leiby, 4 Ohio St. 602; Hull v. Jeffrey, 8 Ohio, 390; Harshman v. Lowe, 9 Ohio, 92; Mitchell v. Gazzam, 12 Ohio, 315; Doremus v. O'Hara, 1 Ohio St. 45.

Missouri—Rev. Stat., ch 8. Partial assignments may give preferences. Shapleigh v. Baird, 26 Mo. 322; Woods v. Timmerman, 27 Mo. 107; Many v. Logan, 31 Mo. 91.

Wisconsin—Rev. Stat., ch. 63; Page v. Smith, 24 Wis. 368.

Iowa—Williams v. Gartrell, 4 Greene (Iowa) 287; Cole v. Dealman, 13 Iowa, 551; Revision 1860, ch. 77; Burrows v. Lehndorf, 8 Iowa, 96; Bebb v. Preston, 1 Iowa, 460. Partial assignments may prefer. Lampson v. Arnold, 19 Iowa, 479.

California—All assignments are prohibited by the insolvent law—Chever v. Hays, 3 Cal. 471,—although a third person intervenes,—Groschen v. Page, 6 Cal. 138,—or they are judicial,—Adams v. Woods, 8 Cal. 152. But the insolvency of the debtor must be established. Morgentham v. Harris, 12 Cal. 245. The prohibition does not extend to an assignment of a bill of lading for the benefit of the vendor. Le Cacheux v. Cutter, 6 Cal. 514.

New York—Assignments by moneyed corporations when insolvent or in contemplation of insolvency are prohibited. 1 Rev. Stat. 591; Hurlbut v. Carter, 21 Barb. 221; Bowery Bank Case, 5 Abb. Pr. 415. The same prohibitions also extend to limited partnerships. 1 Rev. Stat. 766, §§ 20, 21; Fanshawe v. Lane, 16 Abb. Pr. 71; Greene v. Breck, 32 Barb. 73; s. c. 10 Abb. Pr. 42.

The general effect of the State statutes is not to invalidate the assignment, but to make it operate for the benefit of all. Law v. Mills, 18 Penn.

or the whole of them.[1] A surviving partner[2] or a corporation[3] may give a preference.

INCIDENTAL EFFECT TO DEFEAT OTHERS.—The mere fact that the preference defeats all other creditors does not affect the validity of an assignment.[4] A deliberate intention on the part of the debtor that certain creditors shall not be paid out of the property assigned until a preferred class shall be paid is not of itself a fraudulent intent.[5] There may even be an intent to defeat an execution.[6] There must be other ingredients in the case to make the transaction fraudulent. There must be a fraudulent intent. Every conveyance by which an insolvent debtor conveys his whole property to a few preferred creditors, not being more than sufficient to pay their debts, necessarily tends to delay and defeat all other creditors; but however strong the intention is thereby to defeat or delay the latter, still the conveyance is not void on that account.

185; Shapleigh v. Baird, 26 Mo. 322; Floyd v. Smith, 9 Ohio St. 546; Dickson v. Rawson, 5 Ohio St. 219; Shouse v. Utterback, 2 Met. (Ky.) 52; Given v. Gordon, 3 Met. (Ky.) 538; Price v. Mazange, 31 Ala. 701; Crow v. Beardsley, 68 Mo. 435. They do not generally apply to sale to a creditor to pay his own debt and account for the balance. Chaffees v. Risk, 24 Penn. 432; Pomeroy v. Manin, 2 Paine, 476; Carey v. Giles, 10 Geo. 9; Banks v. Clapp, 12 Geo. 514; *vide* Page v. Smith, 24 Wis. 368; Bebb v. Preston, 1 Iowa, 460.

[1] New Albany R. R. Co. v. Huff, 19 Ind. 444.

[2] Hutchinson v. Smith, 7 Paige, 26. *Contra*, Barcroft v. Snodgrass, 1 Cold. 430.

[3] Catlin v. Eagle Bank, 6 Conn. 233; Dana v. Bank of U. S., 5 W. & S. 223; Burr v. M'Donald, 3 Gratt. 215; Arthur v. Commercial Bank, 17 Miss. 394; Town v. Bank, 2 Doug. (Mich.) 530; Hightower v. Mustian, 8 Geo. 506; U. S. v. Bank of U. S., 8 Rob. (La.) 262; Dundas v. Bowler, 3 McLean, 397.

[4] Marbury v. Brooks, 7 Wheat. 566; s. c. 11 Wheat. 78; Byrd v. Bradley, 2 B. Mon. 239; Lawrence v. Neff, 41 Cal. 566.

[5] Wilson v. Eifler, 6 Cold. 31. [6] Hollister v. Loud, 2 Mich. 309.

The law allows a debtor to give a preference to creditors by a *bona fide* conveyance. It allows any creditor also by an execution to acquire a preference *in invitum*. But which shall prevail depends entirely upon the priority of the act by which the preference is legally acquired. Neither is, of itself, a fraud upon the other.[1] The suing creditors strive in a legal way to make their debts to the exclusion of others, and have no right to complain if they are surpassed and outstripped in the race of diligence by another legal mode of obtaining satisfaction. It is only a fair contest between creditors by legal means to secure themselves. Since in law they are equally meritorious, the strongest legal right must prevail.[2] The debtor may also select the time of making an assignment, so as to make the preference effectual.[3]

Secret Motives.—A previous threat is immaterial, for a thing which would be lawful without a threat can not become unlawful because it is done in pursuance of a threat. The declaration of an intention by a debtor to do what the law sanctions as right and proper will not render an assignment fraudulent.[4] Neither law nor equity inquires into the reasons or motives for the preference. The motive which prompted it, provided an honest debt

[1] Halsey v. Whitney, 4 Mason, 206; Bank v. Cox, 6 Me. 395; Tompkins v. Wheeler, 16 Pet. 106; Jaques v. Greenwood, 12 Abb. Pr. 232; Wynne v. Glidwell, 17 Ind. 446; New Albany R. R. Co. v. Huff, 19 Ind. 444; Chandler v. Caldwell, 17 Ind. 256; Bailey v. Mills, 27 Tex. 434.

[2] Hefner v. Metcalf, 1 Head, 577.

[3] Tompkins v. Wheeler, 16 Pet. 106.

[4] Spaulding v. Strang, 37 N. Y. 135; s. c. 38 N. Y. 9; s. c. 32 Barb. 235; s. c. 36 Barb. 310; Wilson v. Britton, 6 Abb. Pr. 34, 97; s. c. 20 Barb. 562; Place v. Miller, 6 Abb. Pr. (N. S.) 178; *vide* Gasherie v. Apple, 14 Abb. Pr. 64; Renard v. Graydon, 39 Barb. 548; s. c. 36 Barb. 310; s. c. 32 Barb, 235; s. c. 25 How. Pr. 178; Dickerson v. Benham, 20 How. Pr. 343; Anthony v. Stype, 26 N. Y. Supr. 265.

is secured, is not the subject of legal inquiry. If, in selecting the objects of his preference, he is guided by mere caprice or favoritism rather than by the superior claims of some of his creditors over others, it is not a subject of legal complaint.[1] He may even be influenced by an expectation to receive employment from the preferred creditors.[2] If the debtor's purpose is to prevent a sacrifice of his property and a race of diligence among his creditors by appropriating it to his preferred creditors, this will not be fraudulent, because it is just what he has a right to do.[3]

Consequence of Right to Prefer.—The right to prefer necessarily involves the right to postpone.[4] A claim may be postponed unless certain collaterals are accounted for.[5] The assignment may provide that no interest shall be paid upon any debt until the principal of all the debts is paid.[6] No principle of public policy or morality is infringed by an agreement among the common creditors of an insolvent debtor, who is about to make an assignment, that he shall prefer one and postpone another, and a promise by one creditor to pay another a certain sum upon condition that the latter, who is a surety for the debtor, will consent to the giving of a preference to him, is valid when the surety is solvent.[7]

Reservations to Debtor.—The fundamental principle of law and justice is that all the property of an insolvent

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[1] Spaulding v. Strang, 37 N. Y. 135; s. c. 38 N. Y. 9; s. c. 32 Barb. 235; s. c. 36 Barb. 310; Hollister v. Loud, 2 Mich. 309; *ex parte* Conway, 12 Ark. 302.

[2] Crawford v. Austin, 34 Md. 49.

[3] Rindskoff v. Guggenheim, 3 Cold. 284.

[4] *Ex parte* Conway, 12 Ark. 302.

[5] Bellows v. Partridge, 19 Barb. 176.

[6] Ingraham v. Grigg, 21 Miss. 22.

[7] Halton v. Jordan, 29 Ala. 266.

debtor shall be applied to the discharge of his debts. If the debtor may want sustenance, so also may the creditors, and if one of them must suffer, the misfortune must, according to law and morals, fall on the debtor. An assignment must, therefore, be made in good faith for the purpose of paying debts, and without any intent to lock up the property from creditors for the use of the debtor. When a person has the full title and desires to retain the control and use of his property and yet transfers it to another to be held for his use, he can, in the general course of human actions, have but one motive for the measure, and that motive must be to defeat or elude the claims of others.[1] This is the reason why all stipulations for any benefit in favor of the debtor render an assignment null and void. The debtor can not retain the use and enjoyment of the property and turn creditors over for their debts to the rents and profits,[2] nor transfer his property and substitute his own bond in its place.[3] An express appropriation of a portion of the property to his use,[4] or for his support,[5] or any provision for his family,[6] renders the assignment void. The mere fact that the debts of the

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[1] Mackie v. Cairns, 5 Cow. 547; s. c. 1 Hopk. 373.

[2] Green v. Trieber, 3 Md. 11; Galt v. Dibrell, 10 Yerg. 146; Price v. Ritger, 44 Md. 521.

[3] Green v. Trieber, 3 Md. 11.

[4] Green v. Trieber, 3 Md. 11; Mackie v. Cairns, 5 Cow. 547; s. c. 1 Hopk. 373; Johnston v. Harvy, 2 Penna. 82; Richards v. Hazard, 1 Stew. & Port. 139; Coate v. Williams, 9 Eng. L. & Eq. 481; s. c. 7 Exch. 205. *Contra*, Murray v. Riggs, 15 Johns. 571; s. c. 2 Johns. Ch. 565; Austin v. Bell, 20 Johns. 442; Estwick v. Caillaud, 5 T. R. 420; s. c. 2 Anst. 381.

[5] Green v. Trieber, 3 Md. 11; Johnston v. Harvy, 2 Penna. 82.

[6] M'Allister v. Marshall, 6 Binn. 338; M'Clurg v. Lecky, 3 Penna. 83; Bradway's Estate, 1 Ashm. 212; Green v. Branch Bank, 33 Ala. 643. *Contra*, Young v. Booe, 11 Ired. 347.

creditors who assent to it amount to more than the value of the property is immaterial.[1]

The debtor cannot postpone creditors to a future day, and have the funds in the meantime applied to the prosecution of his business.[2] An assignment which is to continue until the profits pay the debts, when the property itself is to revert to the debtor, is fraudulent, for it tends to lock up the estate indefinitely, thereby hindering and delaying creditors unreasonably, and securing an ultimate and permanent advantage to the debtor.[3] A debtor has no right, for the same reason, to subject his creditors to the alternative of agreeing that he shall have further time and pay by instalments prescribed by himself, or lose all benefit of his property and chance of being paid in case it should require the whole to satisfy those who may assent to the deed. The effect is to gain time by coercing the creditors who may come in, and to hinder and delay those who may refuse the terms of the deed, as well as those not provided for. Indulgence can not be demanded at the option of the debtor and on his own terms.[4]

No provision can be made for the payment of the expenses incurred by the assignee in obtaining a release for the debtor,[5] or for the payment of the expenses of the debtor in obtaining the benefit of the bankrupt law.[6] A preference can not be given for the purpose of securing to the debtor the future use of a dwelling house without

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[1] M'Allister v. Marshall, 6 Binn. 338.

[2] Bodley v. Goodrich, 7 How. 276; Cleveland v. Railroad Co., 7 A. L. Reg. 536.

[3] Arthur v. Commercial Bank, 17 Miss. 394; Fellows v. Commercial Bank, 6 Rob. (La.) 246. *Contra*, Robins v. Embry, 1 S. & M. Ch. 207; Balto. & Ohio R. R. Co. v. Glenn, 28 Md. 287.

[4] Green v. Trieber, 3 Md. 11.

[5] Austin v. Bell, 20 Johns. 442.

[6] Sewall v. Russell, 2 Paige, 175.

paying rent or being liable therefor.[1] A provision for future advances and future liabilities,[2] or a loan not received at the time of executing the assignment,[3] renders the transfer fraudulent. A stipulation that the debtor shall be permitted to transact business for a certain period without any proceedings being taken against him, either at law or in equity,[4] or contemplating the resumption of business,[5] avoids the assignment. Any reservation in favor of any member of a firm is a trust in favor of the assignors as much as one in favor of all the assignors.[6] A second assignment can not be made for the purpose of indemnifying the assignee for acts to be done by him in compromising with creditors and extinguishing a prior assignment.[7] A stipulation may be inserted requiring a note given in an exchange of accommodation notes to be surrendered as a condition of a preference.[8]

RIGHT TO POSSESSION.—An express reservation of the right to remain in possession until the property is sold,[9] or for such a time as the assignee in his discretion may deem proper,[10] will not vitiate the transfer. A stipulation in the

[1] Elias v. Farley, 40 N. Y. 398; s. c. 5 Abb. Pr. (N. S.) 39; s. c. 2 Abb. Ap. 11.

[2] Barnum v. Hempstead, 7 Paige, 568; Lansing v. Wordsworth, 1 Sandf. Ch. 43; Currie v. Hart, 2 Sandf. Ch. 353; Peacock v. Tompkins, Meigs. 317.

[3] Sheldon v. Dodge, 4 Denio, 217.

[4] Berry v. Riley, 2 Barb. 307; Sheppards v. Turpin, 3 Gratt. 373.

[5] Fairchild v. Hunt, 14 N. J. Eq. 367.

[6] Judson v. Gardner, 4 Leg. Obs. (N. Y.) 424.

[7] Fairchild v. Hunt, 14 N. J. Eq. 367.

[8] Oliver Lee & Co.'s Bank v. Talcott, 19 N. Y. 146; Bank v. Talcott, 22 Barb. 550.

[9] Baxter v. Wheeler, 26 Mass. 21; Dewey v. Littlejohn, 2 Ired. Eq. 495; Moore v. Collins, 3 Dev. 126; Lanier v. Driver, 24 Ala. 149. *Contra*, Knight v. Packer, 12 N. J. Eq. 214.

[10] Planters and Merchants' Bank v. Clarke, 7 Ala. 765; Abercrombie v. Bradford, 16 Ala. 560; Shackelford v. Planters' Bank, 22 Ala. 238.

deed for possession by the debtor for a definite time is an express trust for him and raises a presumption of fraud, unless the period is so short as to leave it indifferent whether it is for the convenience of the assignee and the benefit of the estate or for the benefit of the debtor.[1] No express stipulation can be inserted requiring the employment of the debtor.[2]

WHAT MAY BE SEIZED.—When an assignment is void on account of a reservation in favor of the debtor, creditors may seize the property reserved[3] or the property assigned.[4]

CONCEALMENT.—The concealment of a portion of the assets conveyed by the terms of the assignment does not necessarily invalidate the assignment,[5] but is merely a circumstance tending to prove fraud.[6] The same principle

[1] Hardy v. Skinner, 9 Ired. 191; Hardy v. Simpson, 13 Ired. 132. Six months—Kevan v. Branch, 1 Gratt. 274; Janney v. Barnes, 11 Leigh, 100; Coate v. Williams, 9 Eng. L. & Eq. 481; s. c. 7 Exch. 205—and eight months—Hempstead v. Johnson, 18 Ark. 123—have been deemed to be not unreasonable. In Virginia, two years, with the right to take the profits—Dance v. Seaman, 11 Gratt. 778—and have all the debts over the receipts contracted during that time paid out of the trust fund—Balto. & Ohio R. R. Co. v. Glenn, 28 Md. 287—is good.

[2] McClurg v. Lecky, 3 Penna. 83. *Contra*, Young v. Booe, 11 Ired. 347; Janney v. Barnes, 11 Leigh, 100; Marks v. Hill, 15 Gratt. 400; Rindskoff v. Guggenheim, 3 Cold. 284; Holt v. Kelly, 13 Ir. L. R. 33.

[3] M'Allister v. Marshall, 6 Binn. 338; M'Clurg v. Lecky, 3 Penna. 83.

[4] M'Clurg v. Lecky, 3 Penna. 83.

[5] Reinhard v. Bank of Ky., 6 B. Mon. 252; Wilson v. Berg, 88 Penn. 167.

[6] Guerin v. Hunt, 6 Minn. 375; s. c. 8 Minn. 477; Smith v. Mitchell, 12 Mich. 180; Blackman v. Wheaton, 13 Minn. 326; Lehmer v. Herr, 1 Duvall, 360; Ruble v. McDonald, 18 Iowa, 493; Waverly Nat'l Bank v. Halsey, 57 Barb. 249; Adler v. Ecker, 2 Fed. Rep. 126; Schultz v. Hoagland, 85 N. Y. 464.

applies when the debtor absconds with a portion of the estate,[1] or abstracts a part of the property after the execution of the assignment.[2] These acts are a fraud on the assignment rather than a fraud in it.[3] But if the debtor, through the agency of the assignee, retains more than he can hold under the exemption laws of the State, the assignment is fraudulent.[4]

EXCEPTION FROM OPERATION OF DEED.—An exception whereby the property is retained by the debtor and not conveyed to the assignee is not a reservation of a benefit to the debtor and does not vitiate the assignment.[5] A declaration that certain notes were made for the accommodation of the debtor and directing their return to the makers simply excepts them from the operation of the deed, and does not justify an inference of fraud.[6] Whatever is exempt from execution may be reserved to the debtor.[7] But if the reservation of what may be exempt by

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[1] Wilson v. Forsyth, 24 Barb. 105; American Exchange Bank v. Webb, 15 How. Pr. 193; s. c. 36 Barb. 291; Gates v. Labeaume, 19 Mo. 17; Miller v. Halsey, 4 Abb. Pr. (N. S.) 28; Thomas v. Tallmadge, 16 Ohio St. 434; Spencer v. Jackson, 2 R. I. 35; *vide* Waverly Nat'l Bank v. Halsey, 57 Barb. 249; Foley v. Bitter, 34 Md. 646; Stewart v. Spencer, 1 Curt. 157; Nightingale v. Harris, 6 R. I. 321; Main v. Lynch, 54 Md. 658.

[2] Craft v. Bloom, 59 Miss.

[3] Thomas v. Tallmadge, 16 Ohio St. 434.

[4] Carlton v. Baldwin, 22 Tex. 724; Stewart v. Spencer, 1 Curt. 157; Clark v. Robbins, 8 Kans. 574; Nightingale v. Harris, 6 R. I. 321; Farrin v. Crawford, 2 N. B. R. 602; *in re* Chamberlain *et al.*, 3 N. B. R. 710.

[5] Bank v. Cox, 6 Me. 395; Carpenter v. Underwood, 19 N. Y. 520; Pearce v. Jackson, 2 R. I. 35; Knight v. Waterman, 36 Penn. 258; Bates v. Ableman, 13 Wis. 644; Baldwin v. Peet, 22 Tex. 708; Ingraham v. Grigg, 21 Miss. 22; Dodd v. Hills, 21 Kans. 707; *in re* John C. Walker, 18 N. B. R. 56; *vide* Foster v. Libby, 24 Me. 448; Moss v. Humphrey, 4 Greene (Iowa), 443.

[6] Price v. Deford, 18 Md. 489.

[7] Dow v. Platner, 16 N. Y. 562; Mulford v. Shirk, 26 Penn. 473; Hollister v. Loud, 2 Mich. 309; Baldwin v. Peet, 22 Tex. 708; Garner v.

law gives the debtor the right to select the article, the assignment is void, for the assignee has no certain claim until the election is made.[1]

No Application to Sales.—The rule that there must be no provision for the benefit of the debtor does not apply to a sale. The debtor may take notes for a part of the purchase money and provide that the balance shall be paid to his creditors. Such a stipulation simply relates to the manner in which the property shall be paid for by the purchaser.[2]

Residuary Interests.—There is a distinction between an express trust for the debtor and a benefit which is merely incidental to a trust created for another object.[3] A residuary interest necessarily arises in every case where property is assigned in trust to pay debts, for the surplus by operation of law results in trust for the debtor, but unless the assignment is merely colorable and made for the sake of the resulting trust it is not void.[4] An express reservation of the surplus to the debtor is a mere expression of that which the law would provide without such a declaration, and does not therefore vitiate the transfer.[5]

Frederick, 18 Ind. 507; Smith v. Mitchell, 12 Mich. 180; Heckman v. Messinger, 49 Penn. 465; Brooks v. Nichols, 17 Mich. 38; Farquharson v. McDonald, 2 Heisk. 404; Sugg v. Tillman, 2 Swan. 208; McCord v. Moore, 5 Tenn. 734; Overton v. Hollingshade, 5 Heisk. 283; Richardson v. Marqueze, 59 Miss.

[1] Clark v. Robbins, 8 Kans. 574. [2] Beach v. Bestor, 47 Ill. 521.

[3] Curtis v. Leavitt, 15 N. Y. 9; s. c. 17 Barb. 309; Van Buskirk v. Warren, 39 N. Y. 119; s. c. 34 Barb. 457; 13 Abb. Pr. 145; 4 Abb. Ap. 457. [4] Wilkes v. Ferris, 5 Johns. 335.

[5] Hempstead v. Johnson, 18 Ark. 123; Rowland v. Coleman, 45 Geo. 204; Ely v. Hair, 16 B. Mon. 230; Brown v. Lyon, 17 Ala. 659; Dance v. Seaman, 11 Gratt. 778; Graham v. Lockhart, 8 Ala. 9; Hindman v. Dill, 11 Ala. 689; Dana v. Bank of U. S., 5 W. & S. 223; Johnson v.

When no surplus is expected, an omission to provide for the distribution of any balance that may remain does not affect the transfer.[1] There may be a provision that the surplus shall be paid to the debtor or creditors in the discretion of the assignee.[2]

When Reservation of Surplus Fraudulent.—The reservation of the surplus may, however, be fraudulent. This will depend upon the proportion the value of the estate bears to the debts secured by the assignment. If

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McAllister, 30 Mo. 327; Miller v. Stetson, 32 Ala. 166; Moore v. Collins, 3 Dev. 126; Andrews v. Ludlow, 22 Mass. 28; Vaughan v. Evans, 1 Hill Ch. 414; Floyd v. Smith, 9 Ohio St. 546; Dickson v. Rawson, 5 Ohio St. 219; New Albany R. R. Co. v. Huff, 19 Ind. 444; McFarland v. Birdsall, 14 Ind. 126; Richards v. Levin, 16 Mo. 596; Conkling v. Carson, 11 Ill. 503; Beck v. Burdett, 1 Paige, 305. *Contra*, Barney v. Griffin, 2 N. Y. 365; Goodrich v. Downs, 6 Hill, 438; Lansing v. Woodworth, 1 Sandf. Ch. 43; Strong v. Skinner, 4 Barb. 546; Collomb v. Caldwell, 16 N. Y. 484; Truitt v. Caldwell, 3 Minn. 364; Banning v. Sibley, 3 Minn. 389; Green v. Trieber, 3 Md. 11; Therasson v. Hickok, 37 Vt. 454; Maberry v. Shisler, 1 Harring. 349; Berry v. Riley, 2 Barb. 307; Pierson v. Manning, 2 Mich. 445; Dana v. Lull, 17 Vt. 390. The deed can not be made valid by proof that there will be no surplus—Barney v. Griffin, 2 N. Y. 365; Goodrich v. Downs, 6 Hill, 438; Dana v. Lull, 17 Vt. 390—or by proof that the omission was the effect of haste or inadvertence. Hooper v. Tuckerman, 3 Sandf. 311. The doctrine that the reservation of the surplus renders the deed void is placed in those States where it is adopted upon the ground that the effect is to lock up the property until the creditors, provided for in the assignment, are paid—Dana v. Lull, 27 Vt. 390—because the other creditors can not sell the interest of the debtor subject to the assignment, as they could if it were a mortgage. Leitch v. Hollister, 4 N. Y. 211; Dunham v. Whitehead, 21 N. Y. 131; McClelland v. Remsen, 36 Barb. 622; s. c. 14 Abb. Pr. 331; s. c. 23 How. Pr. 175; Estwick v. Caillaud, 2 Anst. 381; s. c. 5 T. R. 420. The opposite doctrine is held in other cases. Murray v. Riggs, 15 Johns. 571; s. c. 2 Johns. Ch. 565; Austin v. Bell, 20 Johns. 442; Skipwith v. Cunningham, 8 Leigh, 271; Janney v. Barnes, 11 Leigh, 100; Marks v. Hill, 15 Gratt. 400; Ely v. Hair, 16 B. Mon. 230; Graham v. Lockhart, 8 Ala. 9.

[1] Doremus v. Lewis, 8 Barb. 124; Bishop v. Halsey, 3 Abb. Pr. 400; Spies v. Joel, 1 Duer, 669.

[2] Kneeland v. Cowles, 4 Chand. 46.

the assignment covers a great deal of property as a security for a small amount of debts, so that the resulting interest of the debtor is really the valuable interest, the purpose professed is so obviously a mere pretence as not to conceal the true purpose from detection. In such a case the debtor is obviously providing for himself and not for his creditors.[1] Inadequacy of consideration is, however, merely indicative of fraud, and not conclusive evidence [2]

Surplus in Assignment by Partners.—The partnership effects are the primary and natural fund for the payment of the debts of the firm, and the individual property of each member of the firm is the natural fund for the discharge of his private debts. It is therefore perfectly proper for the partners, in making an assignment of the property and effects of the firm for the purpose of discharging their joint debts, to direct the residue of the assigned property, if there should happen to be any, to be returned to them, so that it may be divided between them according to their respective equitable interests therein, leaving each to pay his private debts out of his own individual property.[3] Such an assignment is not fraudulent, because the rights of the separate creditors are subject to an equitable adjustment of accounts between the partners themselves.[4] The result will be the same if the assignment contains no direction to pay the residue of the proceeds to the debtors after paying the firm debts, for the law itself creates a resulting trust in their favor as to such

[1] Moore v. Collins, 3 Dev. 126; Beck v. Burdett, 1 Paige, 305; Hastings v. Baldwin, 17 Mass. 552.

[2] George v. Kimball, 41 Mass. 234.

[3] Bogert v. Haight, 9 Paige, 297; Butt v. Peck, 1 Daly, 83; Hubler v. Waterman, 33 Penn. 414; *vide* Goddard v. Hapgood, 25 Vt. 351.

[4] Collomb v. Caldwell, 16 N. Y. 484; Collumb v. Read, 24 N. Y. 505.

surplus.[1] Real estate held by the partners jointly may be shown to be partnership property.[2]

When one partner, with the consent of his co-partner, assigns his individual estate and the partnership assets to pay his private debts, there may be a reservation in favor of such co-partner of a sum equal to his interest.[3] An assignment of the individual estate made after the execution of an assignment of the firm property is not void, because there is no provision for the payment of debts which are fully provided for in the firm assignment.[4]

SURPLUS AFTER PAYMENT OF ALL.—There is no objection to a reservation to the debtor of what may remain after the payment of all his debts. He may properly enough take to himself what in such case the law would grant as a resulting trust.[5] When the object of the trust is accomplished, what remains will belong to the debtor by operation of law.[6]

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[1] Bogert v. Haight, 9 Paige, 297.

[2] Collumb v. Read, 24 N. Y. 505. When the assignment includes both individual and partnership property it has been held that the surplus can not be reserved to the debtors without providing for the individual creditors. Collomb v. Caldwell, 16 N. Y. 484. But it has also been held that proof must be given that there are separate debts. Bogert v. Haight, 9 Paige, 297.

[3] Mandel v. Peay, 20 Ark. 325.

[4] Bogert v. Haight, 9 Paige, 297. It has been held that an assignment of the individual estate is void if the surplus is reserved to the debtor without providing for the partnership debts. Goddard v. Hapgood, 25 Vt. 351.

[5] Sangston v. Gaither, 3 Md. 40; Beatty v. Davis, 9 Gill. 211; Wintringham v. Lafoy, 7 Cow. 735.

[6] Van Rossum v. Walker, 11 Barb. 237; Ely v. Cook, 18 Barb. 612; Robbins v. Embry, 1 S. & M. Ch. 207; Cross v. Bryant, 3 Ill. 36; Hall v. Dennison, 17 Vt. 310; Hollister v. Loud, 2 Mich. 309; Hoffman v. Mackall, 5 Ohio St. 124; Finlay v. Dickerson, 29 Ill. 9; Matter v. Potter, 54 Penn. 465; Van Hook v. Walton, 28 Tex. 59; Farquharson v. McDonald, 2 Heisk. 404; Gibson v. Walker, 11 Ired. 327.

TIME FOR CLOSING TRUST.—The avowed object of an assignment is to place the property conveyed by it beyond the legal pursuit of creditors, and by the instrument itself to provide another mode for the payment of their debts,[1] and it must not therefore contain any provisions to defeat or hinder this purpose beyond such reasonable delay as may be incidental and necessary to the proper execution of the trust.[2] Delay is necessarily incident to every assignment, but how far it may be necessary to accomplish the object of a distribution of the property must always depend upon the character and condition of the property and of the debts to be paid. Any terms which vary from a plain, direct and immediate application of the effects of the debtor to the payment of his creditors are badges of fraud.[3]

TIME MUST BE REASONABLE.—It is not necessary that the assignment shall fix a time within which the execution of the trust shall be completed, for the trust is under the control of a court of equity, which will compel the assignee to exercise reasonable diligence.[4] If, however, any time is prescribed, it must be reasonable. What is a reasonable time depends upon the nature and circumstances of each particular case. What would be reasonable and proper in one case might be utterly unreasonable and improper in another. Too limited a period of action under an assignment may be as strong evidence of fraud as

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[1] Pope v. Wilson, 7 Ala. 690. [2] Green v. Trieber, 3 Md. 11.

[3] Carlton v. Baldwin, 22 Tex. 724.

[4] Wilt v. Franklin, 1 Binn. 502; Hower v. Geesaman, 17 S. & R. 251; Stevens v. Bell, 6 Mass. 339; Hollister v. Loud, 2 Mich. 309; Bellamy v. Bellamy, 6 Fla. 62; New Albany R. R. Co. v. Huff, 19 Ind. 444; Overton v. Holinshade, 5 Heisk. 283.

one which is too extended. The time must always be regulated by the nature and character of the property assigned and the time necessary to collect and convert it into money. Regard must also be had to the number of creditors and the distance at which they may be placed. For instance, an assignment limiting the time for creditors to file their claims to thirty days would be clearly fraudulent against creditors residing at a great distance. On the other hand, an assignment extending the time to twelve months, where all the creditors reside in the neighborhood, would be equally fraudulent, unless from the nature of the property assigned it could not be put in a shape for distribution at an earlier period.[1]

A postponement of the time of distribution for eight months[2] and twelve months[3] has been held good. A postponement for more than a year has been considered bad.[4] A requirement that the trust shall be closed within two years has been held valid.[5] The vesting of a power in a majority of the creditors to postpone the distribution indefinitely vitiates the assignment.[6] As the assignment may provide that a distribution shall only be made among those creditors who assent to it,[7] the time allowed for expressing their consent should be reasonable.[8] What is a

[1] Robins v. Embry, 1 S. & M. Ch. 207.

[2] Hempstead v. Johnston, 18 Ark. 123.

[3] Robins v. Embry, 1 S. & M. Ch. 207.

[4] Sheerer v. Lautzerheizer, 6 Watts, 543.

[5] Dana v. Bank of U. S., 5 W. & S. 223.

[6] Sheppards v. Turpin, 3 Gratt. 373; Shearer v. Loftin, 26 Ala. 703; Sanderson v. Streeter, 14 Kans. 458; Higby v. Ayres, 14 Kans. 331.

[7] Conkling v. Carson, 11 Ill. 503; Finlay v. Dickerson, 29 Ill. 9.

[8] One year has been considered reasonable. Vaughan v. Evans, 1 Hill Ch. 414. *Contra*, Repplier v. Orrich, 7 Ohio, 2d part, 246; Knight v. Packer, 12 N. J. Eq. 214. Twenty months is allowed in Tennessee. Mayer v. Pulliam, 2 Head. 346; Farquharson v. McDonald, 2 Heisk. 404. Thirty days has been deemed unreasonable. Hardin v. Osborn, 60 Ill. 93.

reasonable time must be determined by the circumstances of each case, the quantity of the estate, the number of creditors and the distance between the parties. As the object of the limitation is to afford to creditors an opportunity to accept or reject the terms offered, the time must not be so short as to prevent a thorough examination.[1]

Delay in Sale and Distribution.—In every assignment a certain amount of discretion is necessarily granted to the assignee. He must, necessarily, from the very nature of the trust conferred upon him, judge for himself, in the absence of express directions, when he can best convert the property into money. Some delay of creditors is the necessary consequence of all assignments, but that alone does not vitiate them. The delay must be shown to be the intent and object of the assignment, not an incidental consequence of it. The object and intent to devote the property to the payment of creditors being meritorious, the unavoidable delay in bringing the property to sale has never been considered as bringing such assignments within the statute.[2] It is the duty of the assignee to proceed without delay and in a proper manner to convert the property into money and pay the debts. He is not, however, bound to proceed to make forced sales after the manner of a sheriff holding property on an execution, unless the terms of the assignment or the manifest interests of the creditors require it. All that is required of the assignee is that he act in good faith, exercise a fair discretion, and do in the premises according to his instructions what a man of ordinary prudence and care would do in regard to his own business.[3] The assignment

[1] Hardin v. Osborn, 60 Ill. 93.

[2] Sackett v. Mansfield, 26 Ill. 21; Wooster v. Stanfield, 11 Iowa, 128; McClung v. Bergfield, 4 Minn. 148.

[3] Hoffman v. Mackall, 5 Ohio St. 124.

may by express terms confer upon him all that the law gives by implication.[1]

Illegal Power Vitiates.—No illegal power, however, should be conferred, for this will render the whole assignment void. The debtor being the absolute owner of the property, and in no manner obliged to assign, may annex such conditions and qualifications to the transfer as he pleases If he annex an improper condition, the court must pronounce the assignment itself void. It can not hold the transfer good and disregard the condition, because that would be to take the property from the debtor against his will. He having consented to part with his title only upon certain conditions, the transfer and condition must stand or fall together. If, therefore, the court upholds the assignment, it must of necessity protect and enforce the terms and conditions upon which it is made. A discretion vested in the assignee, however, will always be construed to mean a reasonable and legal discretion, and will be under the control of a court of equity.[2]

Legal Rights.—The validity of every power conferred upon an assignee must be determined according to the respective legal rights of the debtor and his creditors. Where an individual has incurred an obligation to pay money, the time of payment is an essential part of the contract. When it arrives, the law demands an appropriation by the debtor of his property in discharge of his

[1] McClung v. Bergfield, 4 Minn. 148.

[2] Goddard v. Hapgood, 25 Vt. 351; Benedict v. Huntington, 32 N. Y. 219; *vide* Nicholson v. Leavitt, 6 N. Y. 510; s. c. 10 N. Y. 591; s. c. 4 Sandf. 252; Dunham v. Waterman, 17 N. Y. 9; s. c. 6 Abb. Pr. 357; s. c. 3 Duer, 166; Jessup v. Hulse, 21 N. Y. 168; s. c. 29 Barb. 539; Billings v. Billings, 2 Cal. 107.

liability, and, if he fails, will of itself by its own process compel a performance of the duty. The debtor by the creation of the trust may direct the application of his property and devolve the duty of making the appropriation upon a trustee. This the law permits, and such delay as may be necessary for that purpose.[1] But any delay beyond what may be necessary for the proper execution of the trust involves an illegal hindrance, and thus renders the instrument fraudulent and void.

Delay of Sale.—A power to delay the sale of the property for the purpose of obtaining higher prices renders the assignment void, for the creditors are entitled to have it sold at the best prices it will bring immediately after the execution of the deed.[2] If the interval between the date of the assignment and the day appointed for the sale appears unreasonably long, it is indicative of an intent to shield the property for a time for the use of the debtor, and vitiates the transfer.[3] Forty days,[4] three months,[5] four months,[6] nine months,[7] and eleven months,[8] have been considered good. One year,[9] eighteen months,[10] two years,[11]

[1] Nicholson v. Leavitt, 6 N. Y. 510; s. c. 10 N. Y. 591; s. c. 4 Sandf. 252; Barney v. Griffin, 2 N. Y. 365.

[2] Hart v. Crane, 7 Paige, 37; Hart v. Gedney, 1 Law Rep. 69; Maughlin v. Tyler, 47 Md. 545.

[3] Hafner v. Irwin, 1 Ired. 490; Smith v. Morse, 2 Cal. 524.

[4] Hafner v. Irwin, 1 Ired. 490.

[5] Christopher v. Covington, 2 B. Mon. 357.

[6] Cannon v. Peebles, 2 Ired. 449; s. c. 4 Ired. 204.

[7] Gilmer v. Earnhardt, 1 Jones (N. C.) 559.

[8] Young v. Booe, 11 Ired. 347.

[9] Sheerer v. Lautzerheizer, 6 Watts, 543. *Contra*, Graham v. Lockhart, 8 Ala. 9; Farquharson v. McDonald, 2 Heisk. 404; Rindskoff v. Guggenheim, 3 Cold. 284.

[10] Bancroft v. Snodgrass, 1 Cold. 430.

[11] Quarles v. Kerr, 14 Gratt. 48; Hardin v. Osborn, 60 Ill. 93; *vide* Dance v. Seaman, 11 Gratt. 778.

three years,[1] and five years,[2] have been held fatal. The fact that the assignment is made for the benefit of a part only of the creditors whose debts are equal to the fund assigned, and who do not complain of the delay thereby imposed, does not alter the case, for there is nothing to prevent them from pursuing their remedy against other assets of the debtor, and they might by superior vigilance exhaust those assets, leaving the fund set apart by the instrument tied up till the end of the prescribed period, when it would revert to the debtor.[3]

WITHOUT DELAY.—A direction to the assignee to sell without delay is good, for it means that he shall proceed to sell without unreasonable or unnecessary delay.[4] The assignee can not sell at once, but is bound to exercise reasonable care and prudence in regard to the time and circumstances of the sale. He may take time to advertise, and must therefore select the day when the sale is to take place. If no bidders should attend upon the day appointed, he would have the power, and it would be his duty, to postpone the sale to another day. He will be obliged also to determine whether the property shall be sold in separate parcels or all in one parcel, and to exercise in that and other similar respects some discretion as to the manner and circumstances of the sale. In all these arrangements he is bound to consult the interests of the creditors, and has no right to defer the sale any longer

[1] Adlum v. Yard, 1 Rawle, 163.

[2] Storm v. Davenport, 1 Sandf. Ch. 135.

[3] Storm v. Davenport, 1 Sandf. Ch. 135. It has been held that the deed may direct that the property shall not be sold until judgment is obtained against the sureties. Planters and Merchants' Bank v. Clarke, 7 Ala. 765.

[4] Griffin v. Marquardt, 21 N. Y. 121; s. c. 17 N. Y. 28.

than these interests may be supposed imperatively to require.[1]

DISCRETION.—It is manifestly impracticable to sell in all cases alike within the same period after the execution of the assignment without discrimination. A discretion may therefore be left to the assignee to be regulated and controlled by the rules of law prohibiting all delay except such as may be necessary for a suitable preparation and a proper protection of the interests of the creditors.[2] A discretion of this character is one that results *ex necessitate* from the duty which he has to perform. The assignee may also be allowed to select the place of sale.[3] A provision which requires the assignee to regard the interests of the debtor rather than that of the creditors vitiates the transfer, but a direction to sell at such time as may be best for the interest of the parties concerned is legal, for he should consult the interests of the parties in the order and according to their lawful rights.[4] The price may be left to his discretion.[5] A direction to him to sell at fair and reasonable prices is valid, for whatever prices he can obtain upon a sale fairly made is in legal contemplation a fair and reasonable price.[6] A direction to him to sell as

[1] Jessup v. Hulse, 21 N. Y. 168; s. c. 29 Barb. 539.

[2] Jessup v. Hulse, 21 N. Y. 168; s. c. 29 Barb. 539; Bellows v. Partridge, 19 Barb. 176; Meeker v. Sanders, 6 Iowa, 61; Ogden v. Peters, 21 N. Y. 23; s. c. 15 Barb. 560; Townsend v. Stearns, 32 N. Y. 209; McClung v. Bergfield, 4 Minn. 148; Finlay v. Dickerson, 29 Ill. 9; McCallie v. Walton, 37 Geo. 611; Farquharson v. Eichelberger, 15 Md. 63; Maennel v. Murdock, 13 Md. 164; Mussey v. Noyes, 26 Vt. 462; Inloes v. American Exchange Bank, 11 Md. 173; Benedict v. Huntington, 32 N. Y. 219; Clapp v. Utley, 16 How. Pr. 384; Sackett v. Mansfield, 26 Ill. 21; *vide* Woodburn v. Mosher, 9 Barb. 255; Murphy v. Bell, 8 How. Pr. 468.

[3] Cannon v. Peebles, 2 Ired. 449; s. c. 4 Ired. 204.

[4] Booth v. McNair, 14 Mich. 19.

[5] Ashurst v. Martin, 9 Port. 566; Norton v. Kearney, 10 Wis. 443.

[6] Ely v. Hair, 16 B. Mon. 230.

soon as it can be done without material sacrifice would be proper for the same reason.[1]

MODE OF SELLING.—The power may be given to him to sell at either public or private sale.[2] A direction to sell at public auction is a badge of fraud, because it indicates an intention to sacrifice the property.[3] A provision that the assignee may carry on the business for such time as in his judgment it may be beneficial to do so,[4] or that he may sell gradually in the manner and on the terms in which the debtor would have sold the property in the course of his business, makes the deed void. It simply seeks, through the instrumentality of an assignee, to provide for carrying on the business in the same manner in which it has been before conducted, and for an indefinite period, free from all control or interference on the part of creditors. A debtor can not thus postpone his creditors for an indefinite period without their consent. A conveyance which thus attempts to deprive creditors of their just rights to enforce their claims against the property of their debtor, by placing it beyond their control for an indefinite and uncertain period, must be regarded in conscience and law as a fraud.[5] For the same reason a provision that the

[1] Wooster v. Stanfield, 11 Iowa, 128.

[2] Halstead v. Gordon, 34 Barb. 422; Sackett v. Mansfield, 26 Ill. 21; Hoffman v. Mackall, 5 Ohio St. 124; Nye v. Van Husan, 6 Mich. 329; Marks v. Hill, 15 Gratt. 400. *Contra*, Schoolfield v. Johnson, 11 Fed. Rep. 297; Raleigh v. Griffith, 37 Ark. 150.

[3] Work v. Ellis, 50 Barb. 512.

[4] Jones v. Syer, 52 Md. 211; Gardner v. Commercial Bank, 95 Ill. 298; Spencer v. Slater, L. R. 4 Q. B. Div. 13; Hill v. Agnew, 12 Fed. Rep. 230; First Nat'l Bank v. Hughes, 10 Mo. Ap. 7.

[5] American Exchange Bank v. Inloes, 7 Md. 380; s. c. 11 Md. 173; Truitt v. Caldwell, 3 Minn. 364; Gere v. Murray, 6 Minn. 305; Bartlett v. Teah, 1 McCrary, 176; *vide* Rindskoff v. Guggenheim, 3 Cold. 284; Olney v. Tanner, 10 Fed. Rep. 101.

creditors may carry on the business so long as they may deem it to be their interest to do so renders an assignment void.[1] The assignee may, however, be clothed with the power to replenish the stock so as to facilitate general sales.[2] If a manufacturer has on hand a quantity of raw material at the time of the assignment, the assignee may be permitted to continue the manufactory until this is worked up, and to purchase any necessary article for that purpose.[3] The object of this power is to prevent the sacrifice that would be occasioned by a sale of unmanufactured articles, and thus more effectually promote the interests of the creditors. It must therefore be made merely ancillary to the winding up of the debtor's business. If it makes the creditors partners, it will render the assignment void.[4] It is always a badge of fraud,[5] and the circumstances which will justify it must appear upon the face of the assignment, so that the court may determine whether it is valid or void as a question of law.[6]

Sales on Credit.—A prohibition of sales on credit is valid, for the assignee, in the exercise of a just discretion, may postpone a sale so as to prevent a sacrifice.[7] If, how-

[1] Peters v. Leight, 76 Penn. 289.

[2] Rindskoff v. Guggenheim, 3 Cold. 284; Marks v. Hill, 15 Gratt. 400; Boldero v. London & W. L. & D. Co., L. R. 5 Ex. Div. 47.

[3] De Forrest v. Bacon, 2 Conn. 633; Cunningham v. Freeborn, 11 Wend. 241; s. c. 3 Paige, 537; s. c. 1 Edw. 256; Foster v. Saco Manuf. Co., 29 Mass. 451; Woodward v. Marshall, 39 Mass. 468; Kendall v. New Eng. Carpet Co., 13 Conn. 383; Janes v. Whitbread, 73 E. C. L. 406; s. c. 5 Eng. L. & Eq. 431; Marks v. Hill, 15 Gratt. 400; Rindskoff v. Guggenheim, 3 Cold. 284. *Contra*, Renton v. Kelly, 49 Barb. 536; Dunham v. Waterman, 17 N. Y. 9; s. c. 3 Duer, 166; s. c. 6 Abb. Pr. 357.

[4] Owen v. Body, 5 A. & E. 28.

[5] De Forrest v. Bacon, 2 Conn. 633.

[6] Inloes v. American Exchange Bank, 7 Md. 380; s. c. 11 Md. 173.

[7] Carpenter v. Underwood, 19 N. Y. 520; Grant v. Chapman, 38 N. Y. 293; Stern v. Fisher, 32 Barb. 198; Van Rossum v. Walker, 11 Barb. 237.

ever, there are any circumstances which go to show that a forced sale is intended to the injury of the creditors, they should be taken into consideration as an important item of evidence, and in connection with other facts may justify the inference of an intent to defraud.[1] A power to sell for cash is valid.[2] If the instrument is wholly silent as to the manner or terms of sale, the authority of the assignee to exercise a discretion in regard to a sale for cash or on a reasonable credit is unquestionable upon the ordinary principles which govern the duties of trustees.[3] An express provision, therefore, for that which would be implied by law if it were absent, will not vitiate the assignment.[4]

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[1] Van Rossum v. Walker, 11 Barb. 237.

[2] Eicks v. Copeland, 53 Tex. 581.

[3] Hoffman v. Mackall, 5 Ohio St. 124.

[4] Hoffman v. Mackall, 5 Ohio St. 124; Conkling v. Conrad, 6 Ohio St. 611; Gates v. Labeaume, 19 Mo. 17; Billings v. Billings, 2 Cal. 107; Baldwin v. Peet, 22 Tex. 708; Christopher v. Covington, 2 B. Mon. 357; Shackelford v. Plauters' Bank, 22 Ala. 238; Johnson v. McAllister, 30 Mo. 327; Abercrombie v. Bradford, 16 Ala. 560; Gimmell v. Adams, 11 Humph. 283; Petrikin v. Davis, Morris, 296; Smith v. Leavitts, 10 Ala. 92; Vaughan v. Evans, 1 Hill Ch. 414; England v. Reynolds, 38 Ala. 370; State v. Benoist, 37 Mo. 500; Gilmer v. Earnhardt, 1 Jones (N. C.) 559; Berry v. Matthews, 13 Md. 537; Farquharson v. Eichelberger, 15 Md. 63; Neally v. Ambrose, 38 Mass. 185; Rogers v. De Forest, 7 Paige, 272; Ashurst v. Martin, 9 Port. 566; McClurg v. Allen, 7 Neb. 21; *in re* John C. Walker, 18 N. B. R. 56; Richardson v. Marqueze, 59 Miss. *Contra*, Nicholson v. Leavitt, 6 N. Y. 510; s. c. 10 N. Y. 591; s. c. 4 Sandf. 252; D'Ivernois v. Leavitt, 23 Barb. 63; Burdick v. Post, 12 Barb. 168; s. c. 6 N. Y. 522; Houghton v. Westervelt, Seld. Notes, No. 1, 32; Porter v. Williams, 9 N. Y. 142; s. c. 12 How. Pr. 107; Lyons v. Platner, 11 N. Y. Leg. Obs. 87; Rapalee v. Stewart, 27 N. Y. 310; Gates v. Andrews, 37 N. Y. 657; Bowen v. Parkhurst, 24 Ill. 257; Greenleaf v. Edes, 2 Minn. 264; Truitt v. Caldwell, 3 Minn. 364; Pierce v. Brewster, 32 Ill. 268; Sutton v. Hanford, 11 Mich. 513; Hutchinson v. Lord, 1 Wis. 286; Keep v. Sanderson, 2 Wis. 42; s. c. 12 Wis. 352; Haines v. Campbell, 8 Wis. 187; Sumner v. Hicks, 2 Black, 532; Richardson v. Rogers, 45 Mich. 591. It has been held that the

A sale by an assignee upon credit may be an act of good faith and the proper exercise of discretion, according to circumstances. An inflexible rule that an assignee must, under all circumstances, sell for cash, may at times prove disastrous to the interests of the creditors. Credit may enter largely at times into business transactions, so that to realize anything like a fair value in the sale of property, it may be necessary, under some circumstances, that the assignee shall be allowed the discretion to sell upon credit.[1] If, however, the assignment requires a credit to be given beyond that authorized by law on sales by executors and administrators, it will in general be deemed conclusive evidence of fraud.[2] The power to sell on credit is always a badge of fraud.[3]

DELAY OF DISTRIBUTION.—A power to withhold the distribution of the assets for any length of time which the

power to sell upon such terms and conditions as in the judgment of the assignee may appear best and most for the interest of the creditors is valid, for it does not permit a sale on credit. Kellogg v. Slauson, 11 N. Y. 302; s. c. 15 Barb. 56; Whitney v. Krows, 11 Barb. 198; Southworth v. Sheldon, 7 How. Pr. 414; Clark v. Fuller, 21 Barb. 128; Wilson v. Ferguson, 10 How. Pr. 175; Wilson v. Robertson, 21 N. Y. 587; s. c. 19 How. Pr. 350; Grant v. Chapman, 38 N. Y. 293; Hutchinson v. Lord, 1 Wis. 286; Keep v. Sanderson, 2 Wis. 42; s. c. 12 Wis. 352; Berry v. Hayden, 7 Iowa, 469; Whipple v. Pope, 33 Ill. 334; Booth v. McNair, 14 Mich. 19; McCallie v. Walton, 37 Geo. 611. *Contra*, Schufeldt v. Abernethy, 2 Duer, 533. It has also been held that the sale can not be for money or "available means." Brigham v. Tillinghast, 13 N. Y. 215; s. c. 15 Barb. 618. The objection does not apply when the assignment is made to the creditors themselves. Van Buskirk v. Warren, 39 N. Y. 119; s. c. 34 Barb. 457; s. c. 13 Abb. Pr. 145; s. c. 4 Abb. Ap. 457; Goss v. Neale, 5 Moore, 19.

[1] Hoffman v. Mackall, 5 Ohio St. 124.

[2] Conkling v. Conrad, 6 Ohio St. 611. Six months has been held good. Gilmer v. Earnhardt, 1 Jones (N. C.) 559.

[3] Billings v. Billings, 2 Cal. 107; Baldwin v. Peet, 22 Tex. 708; Carlton v. Baldwin, 22 Tex. 724. In Cannon v. Peebles, 2 Ired. 449; s. c. 4 Ired. 204, the terms were left to the debtor.

assignee, in his discretion, may think proper, would be invalid, for it would give him the power to constrain the creditors into a commutation or release of their claims.[1] If there is no authority to sell, a power to deliver the property to creditors who will take it at stipulated prices vitiates the deed.[2] A bank may authorize a sale of its own notes.[3] Real estate can not be reserved until all the personal property is exhausted.[4] A power to pay the creditors in instalments from time to time as the assets come into the hands of the assignee, or to withhold all payments until the final distribution, is valid.[5]

Compromise.—The assignee may be allowed to compromise bad and doubtful debts due the assignor.[6] Without such a power he may lose a favorable opportunity to unite with others in a composition with a failing debtor, thus losing the whole claim, when by a judicious and timely settlement he could have secured a large portion of it.[7] Compositions, moreover, instead of increasing, diminish the nominal assets; instead of nursing the estate by delay, so as to enhance the probability of a surplus for the debtor's benefit, tend to a more speedy realization at the expense of a possible sacrifice to some extent of his interests. The power of composition can, therefore, in no sense

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[1] D'Ivernois v. Leavitt, 23 Barb. 63.

[2] Banning v. Sibley, 3 Minn. 389.

[3] Montgomery v. Galbraith, 19 Miss. 555.

[4] Pierson v. Manning, 2 Mich. 445.

[5] Eicks v. Copeland, 53 Tex. 581.

[6] Dow v. Platner, 16 N. Y. 562; Brigham v. Tillinghast, 15 Barb. 618; s. c. 13 N. Y. 215; Robins v. Embry, 1 S. & M. Ch. 207; Murphy v. Bell, 6 How. Pr. 468; White v. Monsarrat, 18 B. Mon. 809; Berry v. Hayden, 7 Iowa, 469; Price v. De Ford, 18 Md. 489; Watkins v. Wallace, 19 Mich. 57.

[7] Bellows v. Patridge, 19 Barb. 176.

be called a reservation in favor of the debtor, except in the honest and lawful sense of paying his debts as far and as fast as possible.[1] Power may be given to the assignee to submit disputes that may arise about the property, or the debts owing to or by the assignor, to arbitration.[2]

Uncollectible Debts.—When debts are uncollectible, it would be absurd to require suit to be brought.[3] A direction to collect the debts and demands, or so much thereof as may be found collectible, is good. The assignee may also sell such demands at public auction, when the interests of the estate require such a disposition.[4] Under peculiar circumstances the debtors to the estate were permitted to pay in eight annual instalments.[5]

Power over Property.—It is manifest that the assignee ought to be vested with the means and discretion plainly essential to the proper execution of the trust.[6] He may therefore be vested with the power to insure,[7] to relieve the property from incumbrances,[8] to release goods from an attachment by giving bond, and indemnifying himself from the estate,[9] to commence, maintain, continue, and prosecute, and also to defend, all suits at law or in equity which he may deem necessary to the execution of the trust,[10] to employ suitable agents at a reasonable com-

[1] Dow v. Platner, 16 N. Y. 562; Price v. De Ford, 18 Md. 489.
[2] Watkins v. Wallace, 19 Mich. 57.
[3] Watkins v. Wallace, 19 Mich. 57.
[4] Casey v. Janes, 37 N. Y. 608.
[5] *Ex parte* Conway, 12 Ark. 302.
[6] Bellows v. Patridge, 19 Barb. 176.
[7] Whitney v. Krows, 11 Barb. 198.
[8] Whitney v. Krows, 11 Barb. 198.
[9] Vernon v. Morton, 8 Dana, 247.
[10] Van Nest v. Yoe, 1 Sandf. Ch. 4; Vernon v. Morton, 8 Dana, 247.

pensation to be paid out of the estate,[1] to revoke the appointment of any attorney whom he may select,[2] to pay rent and taxes until the estate is sold,[3] to advertise for creditors in one or more newspapers as soon as conveniently may be, and to select for this purpose such papers as he may deem best calculated to give information to the creditors,[4] and to adopt such measures generally, in relation to the settlement of the estate, as will in his judgment promote the true interests thereof.[5]

Power to Mortgage.—A power to mortgage the property if he shall deem it necessary is beneficial, for it may enable him to guard against a forced and ruinous sale, and may thus be advantageously used for the interests of the creditors.[6] A power to manage and improve the estate means that the estate is to be so managed and improved or ameliorated in respect to its condition as will be most beneficial for the creditors.[7]

Exempting Assignee from Liability.—When a debtor assigns his property in trust for the payment of his debts,

[1] Mann v. Whitbeck, 17 Barb. 388; Vernon v. Morton, 8 Dana, 247; Rankin v. Lodor, 21 Ala. 380; Coate v. Williams, 9 Eng. L. & Eq. 481; s. c. 7 Exch. 205; Gordon v. Cannon, 18 Gratt. 387; Maennel v. Murdock, 13 Md. 164; Van Dine v. Willett, 24 How. Pr. 206; s. c. 38 Barb. 319; Casey v. Janes, 37 N. Y. 608; Hennessy v. Western Bank, 6 W. & S. 300; Nye v. Van Husan, 6 Mich. 329.

[2] Langdon v. Thompson, 25 Minn. 509.

[3] Van Dine v. Willett, 24 How. Pr. 206; s. c. 38 Barb. 319; Morrison v. Atwell, 9 Bosw. 503; Eyre v. Beebe, 28 How. Pr. 333.

[4] Ward v. Tingley, 4 Sandf. Ch. 476.

[5] Mann v. Whitbeck, 17 Barb. 388.

[6] Beatty v. Davis, 9 Gill. 211. This power is not allowed in New York. Darling v. Rogers, 22 Wend. 483; s. c. 7 Paige, 272; Van Nest v. Yoe, 1 Sandf. Ch. 4; Planck v. Schermerhorn, 3 Barb. Ch. 644.

[7] Hitchcock v. Cadmus, 2 Barb. 381; *vide* Schlussel v. Willett, 34 Barb. 615; s. c. 12 Abb. Pr. 397; s. c. 22 How. Pr. 15.

he is bound to select a trustee who will do all that the law requires of a trustee in respect to the rights of those that have a beneficial interest in the property assigned. If he absolves him from any portion of the liability which the law attaches to the office of trustee, he exposes the creditors to the risk of a loss, for the natural tendency of such a stipulation upon the conduct of the trustee is to produce carelessness and negligence in the performance of the trust. If it were allowed, it would enable him to wink at or be blind to transactions in regard to the assets by the debtor which might be injurious or fraudulent. The intent to delay, hinder and defraud creditors is the necessary legal inference from the provision. The assignment will therefore be void unless he is held responsible for the faithful performance of his duties to the full extent of the liability that the law imposes.[1] The diligence of a prudent man is the measure of his duty, for he is a paid agent and not a gratuitous bailee. Such an agent is liable for ordinary negligence or the want of that degree of diligence which persons of common prudence are accustomed to use about their own business and affairs.[2] The assignment will therefore be void if it contains a stipulation that he shall not be liable for any loss that may be sustained by the estate unless the same shall happen by reason of his gross negligence,[3] or wanton neglect,[4] or wilful default.[5] A stipulation that he shall not be liable for

[1] Olmstead v. Herrick, 1 E. D. Smith, 310; McIntire v. Benson, 20 Ill. 500; Finlay v. Dickerson, 29 Ill. 9; August v. Seeskind, 6 Cold. 166.

[2] Litchfield v. White, 7 N. Y. 438; s. c. 3 Sandf. 545; August v. Seeskind, 6 Cold. 166.

[3] Litchfield v. White, 7 N. Y. 438; s. c. 3 Sandf. 545; Olmstead v. Herrick, 1 E. D. Smith, 310; Jacobs v. Allen, 18 Barb. 549; Metcalf v. Van Brunt, 37 Barb. 621.

[4] August v. Seeskind, 6 Cold. 166.

[5] McIntire v. Benson, 20 Ill. 500; Robinson v. Nye, 21 Ill. 592; Finlay v. Dickerson, 29 Ill. 9; Spinney v. Portsmouth Co., 25 N. H. 9; Brown v. Warren, 43 N. H. 430; True v. Congdon, 44 N. H. 48.

any loss that may happen while he is acting in good faith will also render an assignment void, for gross negligence may be consistent with good faith and honesty of intention.[1] It has, however, been held that a stipulation that he shall be responsible only for wilful or neglectful default,[2] or only for wilful commission, omission or neglect,[3] is not objectionable. A provision that the assignee shall not be accountable for property which does not actually come to his possession renders an assignment void, for he is bound to use due diligence to obtain possession.[4] The assignee is bound to use due diligence and good faith in the selection of fit agents, and to hold them to a strict and prompt responsibility for their acts, and after the discharge of this obligation he may be exempt from liability for losses arising through their negligence, defalcation or misfeasance.[5]

Reasonable Expenses.—A provision may be made for the payment of the charges for drawing the assignment[6] and for all reasonable expenses attending the due execution of the trust.[7] The assignee may therefore be

[1] Hutchinson v. Lord, 1 Wis. 286. [2] Whipple v. Pope, 33 Ill. 334.

[3] Maennel v. Murdock, 13 Md. 164.

[4] McIntire v. Benson, 20 Ill. 500; Finlay v. Dickerson, 29 Ill. 9; True v. Congdon, 44 N. H. 48; Pitts v. Viley, 4 Bibb. 446; Spinney v. Portsmouth Co., 25 N. H. 9; *vide* Gordon v. Cannon, 18 Gratt. 387.

[5] Baldwin v. Peet, 22 Tex. 708; Gordon v. Cannon, 18 Gratt. 387; Van Nest v. Yoe, 1 Sandf. Ch. 4; Jacobs v. Allen, 18 Barb. 549; Hennessey v. Western Bank, 6 W. S. 300; Ashurst v. Martin, 9 Port. 566; Rankin v. Lodor, 21 Ala. 380.

[6] Campbell v. Woodworth, 24 N. Y. 304; s. c. 33 Barb. 425; Hill v. Aguew, 12 Fed. Rep. 230.

[7] Jacobs v. Remsen, 36 N. Y. 668; Halstead v. Gordon, 34 N. Y. 422; Campbell v. Woodworth, 24 N. Y. 304; s. c. 33 Barb. 425; Eyre v. Beebe, 28 How. Pr. 333; Butt v. Peck, 1 Daly, 83; Keteltas v. Wilson, 36 Barb. 298; s. c. 23 How. Pr. 69; Bank v. Cox, 6 Me. 395; Blow v. Gage, 44 Ill. 208; Flint v. Clinton Co., 12 N. H. 430.

allowed the expense of hiring necessary clerks or agents,[1] as well as the expense of all necessary suits.[2] A provision for the damages sustained by the assignee is proper, for if he renders himself liable to damages in an honest effort to execute the trust, he is entitled to be indemnified out of the estate.[3]

ASSIGNEE'S COMPENSATION.—The assignee may demand payment for his services before accepting the trust.[4] A provision may also be made in the assignment for a reasonable compensation for his services.[5] If the compensation is excessive, the excess is abstracted from the fund that ought to go to the creditors, and they are thereby defrauded. The assignment is therefore void, for there is no mode of altering the sum.[6] A provision can not be made allowing the assignee both commissions and fees as an attorney. Such an allowance places him in two inconsistent positions, which he ought not to be permitted to occupy, for the same reason that a trustee ought not to be permitted to purchase at his own sale. If a third person were to be employed as counsel, the assignee would probably proceed to close up the assign-

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[1] Jacobs v. Remsen, 36 N. Y. 668.

[2] Lentilhon v. Moffat, 1 Edw. 451.

[3] Blow v. Gage, 44 Ill. 208.

[4] Myers v. Fenn, 5 Wall. 205.

[5] Jacobs v. Remsen, 36 N. Y. 668; Halstead v. Gordon, 34 Barb. 422; Campbell v. Woodworth, 24 N. Y. 304; s. c. 33 Barb. 425; Eyre v. Beebe, 28 How. Pr. 333; Keteltas v. Wilson, 36 Barb. 298; s. c. 23 How. Pr. 69; Bank v. Cox, 6 Me. 395; U. S. Bank v. Huth, 4 B. Mon. 423; Vernon v. Morton, 8 Dana, 247. In New York the assignee's compensation is limited to the commissions allowed by law to executors, administrators and guardians; Barney v. Griffin, 2 N. Y. 365; Campbell v. Woodworth, 24 N. Y. 304; s. c. 33 Barb. 425. In other States an excessive allowance is merely a badge of fraud; Arthur v. Commercial Bank, 17 Miss. 394; Ingraham v. Grigg, 21 Miss. 22.

[6] Campbell v. Woodworth, 24 N. Y. 304; s. c. 33 Barb. 425; Barney v. Griffin, 2 N. Y. 365.

ment with as little litigation as possible. But where the assignee is to pay fees to himself as counsel, a direct pecuniary inducement is offered to him to engage in useless litigation, and thereby impair the fund and delay the final settlement of the assignment. The assignee is also placed under a constant temptation to consult himself in his capacity of attorney in the transaction of every piece of business connected with the trust, to turn from himself as assignee to himself as attorney, and take advice and charge the fund with a fee. A failing debtor can not be permitted to confide a power of this character to a person of his own selection, and thereby tempt him to constant infidelity to his trust.[1]

ATTORNEY'S FEES.—All reasonable and proper charges incurred by the assignee in the employment of attorneys may be allowed. The protection of the estate may often render it necessary to consult and to employ counsel, and the sums paid in such cases should be allowed to a reasonable extent in all cases where it appears that any necessity induced such consultation or employment, or that circumstances existed which justified the expenditure. Such sums are properly embraced in the item of expenses.[2] Even without such a provision the assignee has the power to enforce and defend rights connected with and growing out of the trust, and to pay the expenses so incurred.[3] But the assignment can not designate the attorney to be employed by the assignee.[4]

[1] Heacock v. Durand, 42 Ill. 230; Nichols v. McEwen, 17 N. Y. 22; s. c. 21 Barb. 65.

[2] Butt v. Peck, 1 Daly, 83; Jacobs v. Remsen, 36 N. Y. 668; Iselin v. Dalrymple, 27 How. Pr. 137; s. c. 2 Robt. 142.

[3] Iselin v. Dalrymple, 27 How. Pr. 137; s. c. 2 Robt. 142.

[4] Hill v. Agnew, 12 Fed. Rep. 230. *Contra*, Baldwin v. Pet, 22 Tex. 708.

DEBTOR'S EXPENSES.—No allowance can be made for the expenses incurred by the debtor in defending suits which may be brought by creditors for the recovery of their debts,[1] or in relation to the trust.[2] Such an allowance would secure a benefit from the fund to which the debtor is not entitled, and if upheld would enable him to drive his creditors into almost any terms of compromise. It is a standing notice to all creditors that any effort which they may make to question the amount due to them or to others, as stated in the assignment, or to compel its execution, will be resisted by the debtor to the end of the law, and that he will then subtract the costs and expenses incurred by him in so doing, from the fund to which they are looking for a dividend. It also postpones a distribution for an indefinite length of time. The assignee can not reasonably conjecture what amount of expenses will be incurred by the debtor in litigation, for the latter has the power to determine what suits shall be defended, and to what extremity of appeal such defence shall be carried. To avoid responsibility he would be compelled to defer the close of his trust until these should be ascertained. It would therefore place in the hands of the debtor a means, arising from the assigned property, to deter creditors from questioning his acts, and ultimately to coerce them into his own terms of settlement.[3]

PAYMENT OF DIVIDENDS.—There may be a requirement that no dividend shall be paid unless the person entitled thereto, or his agent, or some credible person, certify on oath that the demand is really due and founded on a lawful consideration,[4] or unless the debt is duly

[1] Sewall v. Russell, 2 Paige, 175. [2] Austin v. Bell, 20 Johns. 442.
[3] Mead v. Phillips, 1 Sandf. Ch. 83.
[4] Ashurst v. Martin, 9 Port. 566; U. S. Bank v. Huth, 4 B. Mon. 423.

proved.[1] The amount of the demand may be limited to such as may be found to be due upon examination and settlement.[2] A prohibition of payment, unless the debtor pronounces the claim to be just, with permission to the creditors to establish their demands by suit or arbitration, is good.[3] Costs that have accrued or may accrue may be excluded.[4] The assignee may be required to exhibit a statement of his accounts periodically to the debtor.[5]

Composition with Creditors.—The assignee can not be allowed to compound with the creditors.[6]

Exclusion of Those Who Sue.—A provision excluding or postponing all creditors who sue the debtor or bring the estate into litigation renders the assignment fraudulent. Such a condition is calculated and intended to deter creditors from attacking the deed lest they lose the benefits of its provisions. It is a hindrance to creditors in the recovery of their just demands. It not only imposes upon them the necessity of acquiescing in the operation of the deed, but it places them at the mercy of the assignee. They must take what he chooses to pay ; or if they refuse and sue they get nothing.[7]

[1] U. S. Bank v. Huth, 4 B. Mon. 423 ; Spencer v. Jackson, 2 R. I. 35 ; U. S. v. Bank of U. S., 8 Rob. (La.) 262 ; Hill v. Agnew, 12 Fed. Rep. 230.

[2] Mussey v. Noyes, 26 Vt. 462.

[3] *Ex parte* Conway, 12 Ark. 302 ; Robins v. Embry, 1 S. & M. Ch. 207.

[4] Gates v. Labeaume, 19 Mo. 17.

[5] *Ex parte* Conway, 12 Ark. 302 ; Robins v. Embry, 1 S. & M. Ch. 207.

[6] Grover v. Wakeman, 11 Wend. 187 ; s. c. 4 Paige, 23 ; Woodburn v. Mosher, 9 Barb. 255 ; Hudson v. Maze, 4 Ill. 578 ; Smith v. Leavitts, 10 Ala. 92 ; Smith v. Hurst, 10 Hare, 30 ; s. c. 15 Eng. L. & Eq. 520 ; s. c. 17 Jur. 30 ; s. c. 22 L. J. Ch. (N. S.) 289 ; *vide* White v. Monsarrat, 18 B. Mon. 809 ; State v. Benoist, 37 Mo. 500.

[7] Gimmell v. Adams, 11 Humph. 283 ; Marsh v. Bennett, 5 McLean, 117 ; Murray v. Riggs, 15 Johns. 571 ; s. c. 2 Johns. Ch. 565 ; *vide* McFarland v. Birdsall, 14 Ind. 126.

CHAPTER XV.

ASSIGNMENTS EXACTING RELEASES.

NATURE OF QUESTION.—An assignment sometimes contains a stipulation that no creditor shall share in the estate until he shall execute a release discharging the debtor from all demands against him. The question in such case is whether an assignment for the benefit of creditors, upon condition that each shall execute a previous release of his whole debt, or be postponed until all other creditors signing a release shall be satisfied in full, is valid; in other words, whether a debtor in failing circumstances and unable to pay all his debts, may say to his creditors that they shall have none of his estate unless they will release the whole of their claim for a portion, and if they decline to surrender the whole for a part, they shall be deferred to the precarious balance which the assenting creditors may leave for the satisfaction of the claims of the recusant creditors.

PUBLIC POLICY.—Every restraint calculated to deter a debtor in failing circumstances from acting on the fears and apprehensions of his creditors ought to be sustained. It is sound policy in commercial affairs, and the best security for fair dealing, that the creditor should be assured that there is not with the debtor an option at any time to compel him to accept a portion of his debt or incur the contingency of losing the whole. To sustain such an assignment is to enable the debtor to prescribe his

own law. The debtor dictates the terms of the settlement. If the creditor refuses, his safest security for his debt, the property of his debtor, is transferred beyond his reach. Unlike deeds of composition, to which none are compelled and the assent of all is necessary, and without the assent of all nothing passes, in such an assignment the terms are absolute and irrevocable, and the creditor must take them as they stand or refuse at the risk of losing his debt. It is the will of the debtor which is law to the creditor. The debtor by this contrivance makes his own bankrupt law. He has, however, no right to dictate terms to his creditors, and to exclude a *bona fide* creditor from all benefit in his property who will not accede to those terms.[1]

COERCION.—Parties not under legal disabilities may make such contracts as they please, and if they are supported by a consideration, and there is no fraud in the case, they will not be disturbed. If a debtor, therefore, with his property in his own hands and open to the legal pursuit of his creditors, can satisfy them that it is for their interest to accept a compromise and give him an absolute discharge, there is no legal objection to it. They treat upon equal terms. The ordinary legal remedies of the creditor are not obstructed. But the case is materially changed when the debtor first places his property beyond the reach of his creditors, and then proposes to them terms of accommodation. He obstructs their legal remedies, hinders and delays them in the prosecution of their suits by putting his property into the hands of an assignee, with the view of getting an absolute discharge from his

[1] Brown v. Knox, 6 Mo. 302; Miller v. Conklin, 17 Geo. 430; Henderson v. Bliss, 8 Ind. 100.

debts, and exempting his future acquisitions from all liability.[1] It is taking an undue advantage of creditors to impose this condition. *Volenti non fit injuria,* if the creditors accept, but it is making volunteers by compulsion. It is mockery to say that consent under such circumstances is optional or voluntary.

Upon principles of morality, law and justice, a debtor is bound to apply his present property and his future earnings and acquirements to the payment of his just debts, and creditors upon the clearest principles of natural justice and of law have a right to pursue such property, earnings and acquirements, until their claims are fully satisfied and paid. Of this inherent right of the creditor, unless relinquished by his consent, the debtor has no right to deprive him. All unjust and indirect means used by a debtor to extort from his creditor a surrender of such rights, all physical or moral coercion resorted to by a debtor to effect such purpose, are fraudulent against creditors. The design of an assignment exacting releases is apparent upon the face of the instrument, and can not leave a moment's doubt upon the subject in the mind of any one. Its object is by a species of moral duress, by indirect means, by a violation of the principles of natural justice and right, to place the creditors in a condition whereby they are compelled to relinquish all claim to any part of the present property of their debtor, or to surrender all right to seek payment out of his future earnings and acquirements. But the debtor has no right to insist on a release as the only condition upon which his property shall be distributed; consequently he has no right to make a provision designed and calculated to procure a release. The law will not allow a person to accomplish

[1] Grover v. Wakeman, 11 Wend. 187; s. c. 4 Paige, 23.

indirectly what he is prohibited from doing directly. The injustice and impropriety of such an effort on the part of the debtor must, moreover, shock the moral sense, and its fraudulent design and effect upon the rights of those creditors who refuse to release are obvious.[1]

Distinction between Conditional and Unconditional Preferences.—A debtor may, undoubtedly, by a transfer of his property, prefer one creditor or class of creditors to another, but the transfer must be *bona fide* for the purpose of conferring a benefit on the creditor, not of securing a benefit to the debtor. The privilege can not be exerted as a device contrived for the purpose of obtaining a benefit to the debtor, by imposing on his creditors what in law can not be otherwise regarded than as a fraudulent moral coercion practised upon them to induce an unwilling surrender to him of their just rights.[2] It does not, therefore, follow that because a debtor may grant a preference absolutely that he may also do so conditionally. The distinction is obvious. In the one case he proposes to pay one or more creditors, still leaving his liability and the balance of his property unaffected as regards the others, while in the other case he designs to influence or coerce all into the terms stipulated, or remove his property out of their reach. He holds out to the creditors this contingent preference to become absolute only by an act of the creditor, beneficial to the debtor himself, by a release of the debt. Such a power would enable the debtor at any time to nullify the statute and lock up his property against his creditors until they accept the terms he chooses to dictate.[3]

[1] McCall v. Hinkley, 4 Gill. 128; The Watchman, 1 Ware, 232.

[2] Brown v. Knox, 6 Mo. 302; McCall v. Hinkley, 4 Gill. 128.

[3] Grover v. Wakeman, 11 Wend. 187; s. c. 4 Paige, 23; Albert v. Winn, 5 Md. 66; s. c. 7 Gill. 446; s. c. 2 Md. Ch. 169; s. c. 2 Md. Ch. 42.

If one assignment fails through their refusal to accept, he may make another assignment of the resulting trust, and thus keep them perpetually at bay.

The real object of the provision, moreover, is not so much to afford a preference to particular creditors as to secure a release from them. And to this end it is admirably adapted. It is contrived so as to create a scramble among the creditors, and a scramble under such circumstances that its natural result will be an unjust advantage to the debtor. It takes away from every creditor the power of acting in the premises according to his individual wishes and judgment, and makes his final course dependent on the course adopted by every other creditor. The purpose of producing this perplexity and embarrassment is, not to effect a just distribution of the estate, but to secure an important advantage to the debtor by its skillful distribution. This advantage, moreover, is not one to which he is in equity and good conscience entitled. The law does not recognize any right on the part of an insolvent debtor to an absolute discharge from his creditors on distributing his estate among them.

Future Earnings.—One who contracts a debt agrees not merely that he will pay it if his present property is sufficient, but also if his future acquisitions shall give him the power. In fine, he pledges both the property he possesses and his capacity to acquire property. It is not true that parties have in view only the property in possession when the contract is formed, or that the obligation of indebtedness does not extend to future acquisitions. The prospect of an inheritance frequently forms a leading inducement to credit, and industry, talents and integrity constitute a fund which is as confidently trusted to as pro-

perty itself. There is not a country in the world where a debtor, by his own act, can compel his creditors to take his property and discharge him from his indebtedness. The *cessio bonorum* of the Roman law, which greatly mitigated the severity of the ancient law by releasing the debtor who delivered up his estate to his creditors from a degrading servitude, did not operate to extinguish the debt. His subsequent acquisitions, with some exceptions, were liable until his debts were fully paid.[1]

The right, either legal or moral, of a debtor to provide in his assignment for a release from debts which he has not paid, stands on no better ground than a right to secure from his creditors a return of a certain percentage on the property distributed, or an engagement that his creditors shall give him new credit.[2] In either case there is a reservation of a benefit to the debtor. When there is a reservation of the future earnings and acquirements, it constitutes an attempt to obtain a full release by a partial payment.[3] Although the statute permits a debtor to prefer one creditor to another, it does not permit him to prefer himself to any creditor.

Dissent of Jurists.—Wherever such an assignment has been sustained it has been against the sound conviction and judgment of the courts, and with a constant expression of regret that a doctrine at variance with equity and with morals must be maintained upon the prevailing understanding of the public. In deference to this opinion some among the purest and loftiest legal

[1] Grover v. Wakeman, 11 Wend. 187; s. c. 4 Paige, 23.

[2] Grover v. Wakeman, 11 Wend. 187; s. c. 4 Paige, 23.

[3] McCall v. Hinkley, 4 Gill. 128; Albert v. Winn, 5 Md. 66; s. c. 7 Gill. 446; s. c. 2 Md. Ch. 42, 169; Grover v. Wakeman, 11 Wend. 187; s. c. 4 Paige, 23.

minds have yielded their own convictions. Chief Justice Marshall said: "We are far from being satisfied that upon general principles such a deed ought to be sustained."[1] Justice Story said: "I am free to say that if the question were entirely new, and many estates had not passed upon the faith of such assignments, the strong inclination of my mind would be against the validity of them."[2] Chief Justice Taney said: "The court was not prepared to affirm that preferences of this character are entirely consistent with the principle of the statute of 13 Eliz."[3] These eminent men yielded to what at the time was deemed the preponderance of opinion, but the judgment and conviction of these great ornaments and lights of the law may still be challenged to support the doctrine of the invalitity of such an assignment. The doctrine is also supported by the weight of authority.[4]

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[1] Brashear v. West, 7 Pet. 608. [2] Halsey v. Whitney, 4 Mason, 206.
[3] White v. Winn, 8 Gill. 499.
[4] Grover v. Wakeman, 11 Wend. 187; s. c. 4 Paige, 23; Albert v. Winn, 5 Md. 66; s. c. 4 Gill. 446; s. c. 2 Md. Ch. 42, 169; Widgery v. Haskell, 5 Mass. 144; Ingraham v. Geyer, 13 Mass. 146; Harris v. Sumner, 19 Mass. 129; Ingraham v. Wheeler, 6 Conn. 277; Atkinson v. Jordan, 5 Ohio, 295; s. c. Wright, 247; The Watchman, Ware, 232; Armstrong v. Byrne, 1 Edw. 79; Mills v. Levy, 2 Edw. 183; Ames v. Blunt, 5 Paige, 13; Van Winkle v. McKee, 7 Mo. 435; Brown v. Knox, 6 Mo. 302; Drake v. Rogers, 6 Mo. 317; Barrett v. Reed, Wright, 700; Howell v. Edger, 4 Ill. 417; Pearson v. Crosby, 23 Me. 261; Woolsey v. Urner, Wright, 606; Ramsdell v. Sigerson, 7 Ill. 78; Conklin v. Carson, 11 Ill. 503; Vose v. Holcomb, 31 Me. 407; Jones v. Dougherty, 10 Geo. 273; McBride v. Bohanan, 50 Geo. 527; Graves v. Roy, 13 La. 454; Miller v. Conklin, 17 Geo. 430; Henderson v. Bliss, 8 Ind. 100; Smith v. Woodruff, 1 Hilt. 462; Butler v. Jaffray, 12 Ind. 504; Wilde v. Rawlings, 1 Head, 34; Palmer v. Giles, 5 Jones Eq. 75; Hurd v. Silsbee, 10 N. H. 108; Wyles v. Beales, 67 Mass. 233; Edwards v. Mitchell, 67 Mass. 239; Bowles v. Graves, 70 Mass. 117; Francis v. Hertz, 55 Geo. 244; Seale v. Vaiden, 10 Fed. Rep. 831. *Contra*, McCall v. Hinkley, 4 Gill. 128; Kettlewell v. Stewart, 8 Gill. 472; White v. Winn, 8 Gill. 499;

RELEASE WHILE DEBTOR REMAINS OWNER.—A preference given in consequence of a release is valid. In no sense can it be said that an agreement by a debtor with a creditor to prefer him for a part of his demand in an assignment, on condition or in consideration that he shall be released from the balance, is a fraud upon those who refuse to become parties to such a contract. The parties treat upon equal terms. The property is open to the pursuit of creditors, and their ordinary legal remedies are not in any degree obstructed. That being so, and with the property still in the hands of the debtor, there is no legal objection to any contract of compromise between the two, even though the consideration for such compromise moving to the creditors is the advantage of a preference over others in a contemplated assignment.[1] The assignee may also covenant to obtain a release.[2]

MUST CONVEY ALL.—As there are some States in which an assignment exacting releases is held valid, the law relating to them will now be considered.

Green v. Trieber, 3 Md. 11; Brashear v. West, 7 Pet. 608; Lippincott v. Barker, 2 Binn. 174; King v. Watson, 3 Price, 6; Halsey v. Whitney, 4 Mason, 206; Pearpoint v. Graham, 4 Wash. C. C. 232; Bank v. Cox, 6 Me. 395; Doe v. Scribner, 41 Me. 277; Nostrand v. Atwood, 36 Mass. 281; Livingston v. Bell, 3 Watts, 198; Lea's Appeal, 9 Penn. 504; Robinson v. Rapelye, 2 Stew. 86; Haven v. Richardson, 5 N. H. 113; Todd v. Bucknam, 11 Me. 41; Niolon v. Douglass, 2 Hill Ch. 443; Skipwith v. Cunningham, 8 Leigh, 271; Ashurst v. Martin, 9 Port. 566; Hall v. Dennison, 17 Vt. 310; Phippen v. Durham, 8 Gratt. 457; Heydock v. Stanhope, 1 Curt. 471; Spencer v. Jackson, 2 R. I. 35; Dockray v. Dockray, 2 R. I. 547; Nightingale v. Harris, 6 R. I. 321; Gordon v. Cannon, 18 Gratt. 387; Clayton v. Johnson, 36 Ark. 406.

[1] Spaulding v. Strang, 37 N. Y. 135; s. c. 38 N. Y. 9; s. c. 32 Barb. 235; s. c. 36 Barb. 310; Low v. Graydon, 50 Barb. 414; Hatch v. Smith, 5 Mass. 42; Powers v. Graydon, 10 Bosw. 630; s. c. 25 How. Pr. 512; Renard v. Graydon, 39 Barb. 548; s. c. 25 How. Pr. 178.

[2] Hastings v. Belknap, 1 Denio, 190.

Such an assignment must convey all the property of the debtor.[1] The creditors are entitled to the benefit of the whole estate, of which they can not be deprived by an arrangement which would impose upon them the necessity of resorting to a part of it in exclusion of the rest. The very imposition of a choice which might prove unfortunate would be an exposure of them to a peril which they are not bound to encounter. An assignment, therefore, that would present but a part of the effects to the creditors and refuse the rest is necessarily fraudulent, inasmuch as it might be a means to extort an unfair advantage.[2] When it is made by partners, it must be signed by all the partners,[3] and convey all their property, as well their individual estate as their partnership effects.[4]

Not Reserve Share of Dissenting Creditors.—If the assignment stipulates that the share which would otherwise belong to the creditor who should come in and accede to the terms and execute a release, shall, on his refusal or default, be paid back to the debtor, or placed at his disposal by the assignee, it is deemed oppressive and fraudulent and destroys the validity of the assignment. The effect is to lock up the surplus until the preferred creditors

[1] Green v. Trieber, 3 Md. 11; Sangston v. Gaither, 3 Md. 40; Seaving v. Brinkerhoff, 5 Johns. Ch. 329; Thomas v. Jenks, 5 Rawle, 221; Hennessey v. Western Bank, 6 W. & S. 300; *in re* Wilson, 4 Penn. 430; Johns v. Bolton, 12 Penn. 339; Graves v. Roy, 13 La. 454; Henderson v. Bliss, 8 Ind. 100; Gadsden v. Carson, 9 Rich. Eq. 252; Gordon v. Cannon, 18 Gratt. 387. *Contra*, Halsey v. Whitney, 4 Mason, 206; Bank v. Cox, 6 Me. 395; Spencer v. Jackson, 2 R. I. 35; Stewart v. Kerrison, 3 Rich. (N. S.) 266.

[2] Hennessey v. Western Bank, 6 W. & S. 300; *in re* Wilson, 4 Penn. 430; Weber v. Samuel, 7 Penn. 499. [3] Maughlin v. Tyler, 47 Md. 545.

[4] Insurance Co. v. Wallis, 23 Md. 173; Thomas v. Jenks, 5 Rawle, 221; Hennessey v. Western Bank, 6 W. & S. 300; Henderson v. Bliss, 8 Ind. 100; Gordon v. Cannon, 18 Gratt. 387.

are paid off, and the others are not only hindered and delayed in their remedies, but they are necessarily involved in controversy. The property passes to the assignee and can not be touched, and the only remedy would be against him as assignee.[1]

Reservation of Surplus.—The surplus which remains after the payment in full of all the claims of the creditors who assent to the deed can not be reserved to the debtor.[2] There must be no reservation to the debtor, either express or implied. The court can not look outside of the assignment to ascertain whether there will be a surplus or not. That would make the efficacy of the instrument depend on extrinsic circumstances when the law requires that its intent shall be gathered from its face. When the surplus is not disposed of in the assignment it belongs to the debtor as a resulting trust. It is true the other creditors may prosecute their claims against the assignee in respect of this surplus, but they could arrest it only by process of law, and the debtor has no right to compel them to resort to this, for the fund would be claimed not under the deed, but as the property of the debtor.[3]

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[1] Reavis v. Garner, 12 Ala. 661; Sangston v. Gaither, 3 Md. 40; Trieber v. Green, 3 Md. 11; Hollins v. Mayer, 3 Md. Ch. 343; Burd v. Smith, 4 Dall. 76; Austin v. Bell, 20 Johns. 442; Seaving v. Brinkerhoff, 5 Johns. Ch. 329; Lentilhon v. Moffatt, 1 Edw. 451. *Contra*, Halsey v. Whitney, 4 Mason, 206; Andrews v. Ludlow, 22 Mass. 28; Dockray v. Dockray, 2 R. I. 547.

[2] Bridges v. Hindes, 16 Md. 101; Grimshaw v. Walker, 12 Ala. 101; Whedbee v. Stewart, 40 Md. 414; Spencer v. Slater, L. R. 4 Q. B. Div. 13; *in re* Beadle, 5 Saw. 351; *in re* Broome, 3 Ben. 488; s. c. 3 N. B. R. 444. *Contra*, Andrews v. Ludlow, 22 Mass. 28; Livingston v. Bell, 3 Watts, 198; Mechanics' Bank v. Gorman, 8 W. & S. 304; Haven v. Richardson, 5 N. H. 113; Skipwith v. Cunningham, 8 Leigh, 271; Gordon v. Cannon, 18 Gratt. 387; Todd v. Bucknam, 11 Me. 41.

[3] Malcom v. Hodges, 8 Md. 418; West v. Snodgrass, 17 Ala. 549.

No Extrinsic Evidence.—It is the duty of the party who sets up an assignment to show that the debtor has done what the law requires to give it validity and effect.[1] Extrinsic evidence can not be given to show that in point of fact the assignment does convey all the property which the debtor had at the time of its execution.[2] The assignment on its face must show that it conveys all the debtor's property, and its terms must be inconsistent with the retention of any property either real or personal.[3] No particular words are necessary to be used, but such must be employed as will convey all the debtor's property. All that is required is that the words should comprehend all, and thereby negative every presumption that there is other property. Any apt words to this end will be sufficient.[4] The words "estate of every kind and description" are sufficient.[5] It is not necessary that there should be words of inheritance. In a deed of trust conveying property for the payment of the debts of the grantor, the omission of the words "and his heirs" does not have the effect of confining the grant to personalty, but where the intent to convey all the property of the debtor is manifest, a fee simple in realty passes by implication under the deed.[6]

All the partners must unite in the execution of such an assignment.[7] The right of dower of the debtor's wife

[1] Sangston v. Gaither, 3 Md. 40; Keighler v. Nicholson, 4 Md. Ch. 86.

[2] Barnitz v. Rice, 14 Md. 24. *Contra*, Nightingale v. Harris, 6 R. I. 331; Gordon v. Cannon, 18 Gratt. 387.

[3] Rosenberg v. Moore, 11 Md. 376; Barnitz v. Rice, 14 Md. 24; Seaving v. Brinkerhoff, 5 Johns. Ch. 329.

[4] Barnitz v. Rice, 14 Md. 24.

[5] Farquharson v. Eichelberger, 15 Md. 63; Bridges v. Hindes, 16 Md. 101.

[6] Farquharson v. Eichelberger, 15 Md. 63; Spessard v. Rohrer, 9 Gill. 261; Angell v. Rosenberg, 12 Mich. 241.

[7] *In re* Wilson, 4 Penn. 430; Hennessey v. Western Bank, 6 W. & S. 300; *vide* Gordon v. Cannon, 18 Gratt. 387.

need not be conveyed.[1] A creditor who holds a claim against two debtors composing one firm has no right to complain because a person who is partner with them in another firm does not join in the assignment. All he has a right to ask is that the assets of his debtors, both individual and partnership, shall be made liable for the payment of his debt.[2]

A provision for the payment of forty per cent., with a stipulation for a return of the surplus, renders the deed void.[3] If the deed professes to convey all, but assigns only a portion, it is fraudulent.[4] If the debtor absconds with a portion of the funds, and executes an assignment of the balance, the deed is void, but it must be proved that he intends to defraud by the deed, and that it is actually the instrument to defraud. A release will be void if the debtor has executed prior fraudulent conveyances.[6]

Reasonable Time.—An assignment should give to the creditors all the information in the power of the debtor as to the nature and value of the property conveyed, and the amount of the debts intended to be provided for, and a reasonable time to obtain such information as the deed

[1] Breitenbach v. Dungan, 1 A. L. Reg. 419.

[2] Maennel v. Murdock, 13 Md. 164. It has been held that property encumbered beyond its value, Fassett v. Phillips, 4 Whart. 399, or of small value, Phippen v. Durham, 8 Gratt. 457, need not be included, and that a small sum might be reserved to pay small debts. Skipwith v. Cunningham, 8 Leigh, 271.

[3] Jacot v. Corbett, 1 Chev. Eq. 71. It has been held that a provision for the payment of only a certain per cent. is good when it appears that no benefit will result thereby to the debtor. Nightingale v. Harris, 6 R. I. 321.

[4] Le Prince v. Guillemot, 1 Rich. Eq. 187; Nightingale v. Harris, 6 R. I. 321.

[5] Stewart v. Spencer, 1 Curt. 157; Spencer v. Jackson, 2 R. I. 35; Nightingale v. Harris, 6 R. I. 321; Foley v. Bitter, 34 Md. 646.

[6] Doe v. Scribner, 41 Me. 277.

may not afford, and to make up their minds deliberately and understandingly whether they will accept or reject the offer made to them. If this is not done when it can conveniently be done, the omission is a badge of fraud.[1] What is a reasonable time is a matter dependent upon the particular circumstances of each case. A time may be so short or so long as justly to raise a presumption of fraud.[2] If no time is fixed within which the release must be executed, the deed is void.[3] Two months[4] and six months[5] have been deemed sufficient. Nine months has been considered too long.[6] A different time may be allowed to resident and non-resident creditors.[7]

No doubt which may exist as to the construction of the assignment, nor any difficulty which may arise in making an election, can affect the case, if the meaning of the deed can be ascertained. The circumstances which create the doubt or difficulty may tend to prove and even be in themselves sufficient to prove an intent to delay, hinder and defraud creditors and make the deed void, but if no such intention exists the assignment will be valid.[8]

PREFERENCES.—An assignment need not convey the property for the benefit of all creditors equally, but may give preferences,[9] and confer a benefit upon some creditors

[1] Gordon v. Cannon, 18 Gratt. 387.

[2] Halsey v. Whitney, 4 Mason, 206; Pearpoint v. Graham, 4 Wash. C. C. 232; Ashurst v. Martin, 9 Port. 566.

[3] Henderson v. Bliss, 8 Ind. 100; Pearpoint v. Graham, 4 Wash. C. C. 232.

[4] Pearpoint v. Graham, 4 Wash. C. C. 232; Gordon v. Cannon, 18 Gratt. 387. *Contra*, Fox v. Adams, 5 Me. 245.

[5] Halsey v. Whitney, 4 Mason, 206; Ashurst v. Martin, 9 Port. 566.

[6] Burd v. Smith, 4 Dall. 76.

[7] Hennessey v. Western Bank, 6 W. & S. 300.

[8] Gordon v. Cannon, 18 Gratt. 387.

[9] Maennel v. Murdock, 13 Md. 164; Gordon v. Cannon, 18 Gratt. 387.

absolutely, and to others only upon condition.[1] The property may be delivered in specie to the creditors at prime cost, for when a common price is fixed as a measure of distribution, it is immaterial at what it is put, provided the actual value is not more than adequate to satisfaction in full,[2] and the question of prime cost may be left to be settled by the assignee.[3] No provision can be made in favor of creditors who have released under a prior assignment.[4]

The Release.—The form of the release may be prescribed, for the creditor is a purchaser of his preference, and must take it on the debtor's terms.[5] An assignment may provide for the release of sureties.[6] It is not necessary that the creditors should assent before the assignment is recorded.[7] One partner is competent in his own name, or in the name of the firm, to release a debt, and for the same reason he may enter into a composition and execute an assignment, and it will release the debt. A signature and sealing in the name of the firm with a single seal is good and valid to release the debt and bind the rights of the firm.[8]

When the taint which avoids an assignment is apparent on the face of the instrument, a release is made with full knowledge of the fraud, and does not give it validity.[9] Such an assignment, however, is not binding upon the creditors who execute releases until it is declared void by

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[1] Rankin v. Lodor, 21 Ala. 380.
[2] Bayne v. Wylie, 10 Watts, 309.
[3] Bayne v. Wylie, 10 Watts, 309.
[4] Nightingale v. Harris, 6 R. I. 321.
[5] Bayne v. Wylie, 10 Watts, 309.
[6] Bank v. Cox, 6 Me. 395.
[7] Haven v. Richardson, 5 N. H. 113.
[8] Halsey v. Whitney, 4 Mason, 206.
[9] *In re* Wilson, 4 Penn. 430.

a competent court. As the assignment is void, the consideration upon which the releases are executed wholly fails, and the creditors who execute them may, with the consent of the debtor, obtain judgment upon their original debts, lay an attachment in the hands of the assignee, and hold the fund against a subsequent attachment laid by a creditor who does not execute a release.[1]

[1] Insurance Co. v. Wallis, 23 Md. 173; Maughlin v. Tyler, 47 Md. 545.

CHAPTER XVI.

HOW FAR A FRAUDULENT TRANSFER IS VOID.

GOOD BETWEEN PARTIES.—The statute was designed solely to protect the rights of creditors, and consequently it renders a fraudulent transfer void only as against them, and makes no provision whatever in regard to its effect between the parties. This is the effect of the word "only." This word was inserted to restrict the broad provisions of the statute to the rights which the legislature designed to protect, and thus left the relative rights of the parties to the provisions of the common law.[1] A conspiracy to defraud creditors is an offense against good morals, common honesty and sound public policy, for it is a let and hindrance to the due course and execution of law and justice, and tends to overthrow all true and plain dealing, bargaining and chevisance between man and man, without which no commonwealth or civil society can be maintained or continued. It is therefore a proper case for the application of the maxim, "*In pari delicto melior est conditio defendentis.*" *Porro autem si et dantis et excipientis turpis causa sit, possessorem potiorem esse et ideo repetitionem cessare.*[2] The principle that a collusive contract binds the parties to it is a principle which commends itself no less to the moralist than to the jurist, for there is no obligation upon any one to extricate a rogue from his

[1] Nellis v. Clark, 4 Hill, 424; s. c. 20 Wend. 24.

[2] Dig. Lib. 12, Tit. 5 (C.) 8.

own toils. On any other principle a knave might gain, but could not lose, by a dishonest expedient, and inducements would be furnished to unfair dealing if the law were to repair the accidents of an unsuccesful trick. A fraudulent grantee, therefore, is allowed to retain the property, not for any merit of his own, but for the demerit of his confederate, in accordance with a wise and liberal policy, which requires that the consequences of a fraudulent experiment shall be made as disastrous as possible.[1] The law endeavors to environ a debtor with all possible perils and make it appear that honesty is the best policy.[2]

BINDS GRANTOR AND HIS REPRESENTATIVES.—A fraudulent transfer is good as against the grantor,[3] his heirs,[4]

[1] Stewart v. Kearney, 6 Watts, 453; Falconer v. Jones, 3 Dev. 334.

[2] Murphy v. Hubert, 16 Penn. 50.

[3] Stewart v. Iglehart, 7 G. & J. 132; Freeman v. Sedgwick, 6 Gill. 28; Phettiplace v. Sayles, 4 Mason, 312; Canton v. Dorchester, 62 Mass. 525; Terrell v. Imboden, 10 Leigh, 321; Simpson v. Graves, Riley Ch. 219, 232; Gifford v. Ford, 5 Vt. 532; Hartley v. M'Annulty, 4 Yeates, 95; Stewart v. Dailey, 6 Litt. 212; Chessman v. Exall, 6 Exch. 341; Sumner v. Murphy, 2 Hill (S. C.) 488; Leshey v. Gardner, 3 W. & S. 314; Newell v. Newell, 34 Miss. 385; Williams v. Avent, 5 Ired. Eq. 47; Tuesley v. Robinson, 103 Mass. 558; Dale v. Harrison, 4 Bibb. 65; Byrd v. Curlin, 1 Humph. 466; Noble v. Noble, 26 Ark. 317; Pratt v. Cox, 22 Gratt. 330; Edwards v. Haverstick, 53 Ind. 348; Bowser v. Bowser, 82 Penn. 57; Kenney v. Con. Va. M. Co., 4 Saw. 382; Ybarra v. Lozenzana, 53 Cal. 197; Maher v Bovard, 14 Nev. 324; Schuman v. Peddicord, 50 Md. 560; Wolfe v. Beecher Manuf. Co., 47 Conn. 231; Shallcross v. Deats, 43 N. J. 177; *vide* Taylor v. Bowers, L. R. 1 Q. B. Div. 291.

[4] Getzler v. Saroni, 18 Ill. 511; Cushwa v. Cushwa, 5 Md. 44; Danzey v. Smith, 4 Tex. 411; Kimball v. Eaton, 8 N. H. 391; Jewell v. Porter, 31 N. H. 34; Jackson v. Garnsey, 16 Johns. 189; Ober v. Howard, 11 Mo. 425; Stewart v. Ackley, 52 Barb. 283; Dearman v. Radcliffe, 5 Ala. 192; Reichert v. Castator, 5 Binn. 109; Jackson v. Dutton, 3 Harring. 98; s. c. 2 Del. Ch. 86; Barton v. Morris, 15 Ohio, 408; Trempner v. Barton, 18 Ohio, 418; Church v. Church, 4 Yeates, 280; Laney v. Laney, 2 Ind. 196; McLaughlin v. McLaughlin, 16 Mo. 242; Lockerson v. Stillwell, 13 N. J. Eq. 357; Anderson v. Rhodus, 12 Rich. Eq. 104; Gillespie v. Gillespie, 2 Bibb. 89; Horner v. Zimmerman, 45 Ill. 14.

executors,[1] administrators,[2] agents,[3] parties claiming under

[1] Dorsey v. Smithson, 6 H. & J. 61; Welsh v. Bekey, 1 Penna. 57; Orlabar v. Harwar, Comb. 348; Odronaux v. Helis, 3 Sandf. Ch. 512; Anderson v. Dunn, 19 Ark. 650; Eubanks v. Dobbs, 4 Ark. 173; Howell v. Edmonds, 47 Ill. 79; *Contra*, *ex parte* Adams, 2 Red. 66.

[2] Hawes v. Leader, Yelv. 196; s. c. Cro. Jac. 270; Thomas v. Soper, 5 Munf. 28; Kinnemon v. Miller, 2 Md. Ch. 407; King v. Clarke, 2 Hill Ch. 611; Coltraine v. Causey, 3 Ired. Eq. 246; Cocke v. Bromley, 6 Munf. 184; Martin v. Martin, 1 Vt. 91; Dunbar v. McFall, 9 Humph. 505; Choteau v. Jones, 11 Ill. 301; Peaslee v. Barney, 1 Chip. 331; Bank v. Burke, 4 Blackf. 141; McLaughlin v. McLaughlin, 16 Mo. 242; Avery v. Avery, 12 Tex. 54; Connell v. Chandler, 13 Tex. 5; Crosby v. De Graffenreid, 19 Geo. 290; Beale v. Hall, 22 Geo. 431; Winn v. Barnett, 31 Miss. 653; Gully v. Hull, 31 Miss. 20; George v. Williamson, 26 Mo. 190; Brown v. Finley, 18 Mo. 375; Jordan v. Fenno, 13 Ark. 593; Lassiter v. Cole, 8 Humph. 621; Adams v. Broughton, 13 Ala. 731; Moore v. Minerva, 17 Tex. 20; Moody v. Fry, 3 Humph. 567; Dennison v. Ely, 1 Barb. 610; Osborne v. Moss, 7 Johns. 161; Harmon v. Harmon, 63 Ill. 512; Rodin v. Murphy, 10 Ala. 804; Rhein v. Tull, 35 N. C. 57; White v. Russell, 79 Ill. 155; Hall v. Callahan, 66 Mo. 316; Crawford v. Lehr, 20 Kans. 509; Beebe v. Saulter, 87 Ill. 518. *Contra*, Buehler v. Gloninger, 2 Watts, 226; Stewart v. Kearney, 6 Watts, 453; Williams v. Williams, 34 Penn. 312; Freeman v. Burnham, 36 Conn. 469; Everett v. Read, 3 N. H. 55; Kingsbury v. Wild, 3 N. H. 30; Brownell v. Curtis, 10 Paige, 210; Babcock v. Booth, 2 Hill, 181; Caswell v. Caswell, 28 Me. 232; Morris v. Morris, 5 Mich. 171; Holland v. Cruft, 37 Mass. 321; Drinkwater v. Drinkwater, 4 Mass. 354; Norton v. Norton, 59 Mass. 524; Gibbons v. Peeler, 25 Mass. 254; Welsh v. Welsh, 105 Mass. 385; Sullice v. Gradenigo, 15 La. An. 582; Hunt v. Butterworth, 21 Tex. 133; Allen v. Allen's Adm., 18 Ohio St. 234; Allen v. Mower, 17 Vt. 61; Love v. Mickals, 11 Ind. 227; McLane v. Johnson, 43 Vt. 48; Abbott v. Tenney, 18 N. H. 109; Garner v. Graves, 54 Ind. 188; Martin v. Bolton, 75 Ind. 295; Fordy v. Exempt Fire Co., 50 Cal. 299; Barton v. Hosner, 31 N. Y. Supr. 467. The right of executors and administrators to impeach a fraudulent conveyance when the estate is insolvent is conferred by statute in Massachusetts, Vermont, New Jersey, North Carolina, Wisconsin, Michigan, Ohio, Indiana, Louisiana, California, New York and Texas, and several of the above cases are upon those statutes. It was held in the following cases that property fraudulently conveyed was assets in the hands of the executor: Shears v. Rogers, 3 B. & A. 362; Anon. 2 Rol. Rep. 173; Bethel v. Stanhope, Cro. Eliz. 810; Anon. Cary, 25; Smith v. Pollard, 4 B. Mon. 66. Where the personal representative proceeds under

him,[1] and his vendees and grantees.[2] A fraudulent receipt to a person who owes money to the debtor is as binding as any other transfer.[3] If the property is transferred by a deed with covenant of warranty, and the debtor subsequently purchases the property at a sale under an execution against him, the title thus obtained enures to the benefit of the fraudulent grantee, and the debtor[4] and parties purchasing from him with notice of the prior transfer[5] are estopped by the covenant from denying or resisting the title of the fraudulent grantee. But if he

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a statute or otherwise, he can only impeach a transfer when the estate is insolvent. Wall v. Provident Inst., 85 Mass. 96; Hess v. Hess, 19 Ind. 238; Pringle v. Pringle, 59 Penn. 281.

[3] Newson v. Douglass, 7 H. & J. 417; Owen v. Dixon, 17 Conn. 492.

[1] Moseley v. Moseley, 15 N. Y. 334; Wright v. Wright, 2 Litt. 8; Roane v. Vidal, 4 Munf. 187; Neeley v. Wood, 10 Yerg. 486; Douglass v. Dunlap, 10 Ohio, 162; McClesky v. Leadbetter, 1 Kelly, 551; Ellis v. McBride, 27 Miss. 155; Zimmerman v. Schoenfeldt, 6 T. & C. 142.

[2] Bull v. Harris, 18 B. Mon. 195; Doolittle v. Lyman, 44 N. H. 608; Triplett v. Witherspoon, 70 (N. C.) 589; Campbell v. Whitson, 68 Ill. 240; Vanzant v. Davies, 6 Ohio St. 52; Marston v. Brackett, 9 N. H. 336; Foster v. Walton, 5 Watts, 378; Coppage v. Barnett, 34 Miss. 621; Long v. Wright, 3 Jones N. C. 290; Stevens v. Morse, 47 N. H. 532; Gregory v. Haworth, 25 Cal. 653; Bayless v. Elcan, 1 Cold. 96; Lawton v. Gordon, 34 Cal. 36; Fowler v. Stoneum, 11 Tex. 478; Hubbs v. Brockwell, 3 Sneed, 574; Eddins v. Wilson, 1 Ala. 237; Douglass v. Dunlap, 10 Ohio, 162; Garrison v. Brice, 3 Jones (N. C.) 85; Prestidge v. Cooper, 54 Miss. 74; Gregory v. Wheedon, 8 Neb. 373; *vide* Lewis v. Castleman, 27 Tex. 407; Plummer v. Worley, 13 Ired. 423; Ingles v. Donalson, 2 Hayw. 57; Searcy v. Carter, 4 Sneed, 271; Mason v. Baker, 1 A. K. Marsh. 208; Lewis v. Love, 2 B. Mon. 345; Cox v. Jackson, 88 Mass. 108; Wyman v. Brown, 50 Me. 139; Newson v. Lycan, 3 J. J. Marsh. 440; Elliott v. Horn, 10 Ala. 348; Lewis v. Caperton, 8 Gratt. 148; McGuire v. Miller, 15 Ala. 394; Beall v. Williamson, 14 Ala. 55; Henderson v. Dickey, 50 Mo. 161; Howe v. Waysman, 12 Mo. 169; Hurley v. Oeler, 44 Iowa, 642.

[3] Sickman v. Lapsley, 13 S. & R. 224.

[4] Dunbar v. McFall, 9 Humph. 505; Trempner v. Barton, 18 Ohio, 418; Gibbs v. Thayer, 60 Mass. 30; Barton v. Morris, 15 Ohio, 408.

[5] Perry v. Calvert, 22 Mo. 361.

makes a conveyance with a covenant of warranty after the making of the fraudulent conveyance, and then acquires the title of one who buys the property at a sale under an execution, the purchase will be held to support the last rather than the first conveyance. The debtor's executor, however, may purchase the property after a sale, and will obtain a good title.[2]

Executory Contracts.—The same principles of policy which require that a fraudulent transfer shall be held valid as between the parties, also demand that no aid or relief shall be granted for the enforcement of any agreement arising out of a fraudulent transaction. The suppression of fraud is far more likely in general to be accomplished by leaving the parties without remedy against each other, and thus introducing a preventive check naturally connected with a want of confidence and a sole reliance upon personal honor. Any other doctrine would, moreover, destroy the rule itself, for parties could evade it by means of an agreement made at the time of the transfer. It is upon these principles that the maxim *ex turpi causa non actio oritur* is founded. *Pacta quæ contra leges et constitutiones vel contra bonos mores sunt, nullam vim habere indubitati juris est.*[3]

Equity will not Enforce Agreements.—Whenever a party to a fraud applies to a court of equity, the reasons for withholding relief are much stronger, for he who seeks equity must have an honest and just claim. Equity, therefore, never decrees a specific performance of an agreement made by the fraudulent grantee to re-convey the property

[1] Arnold v. Hymes, 5 Fed. Rep. 578.
[2] Smith v. Pollard, 4 B. Mon. 66.
[3] Dig. Lib. 2, tit. 3, § 6.

to the debtor. The violation of such an agreement is no fraud. *Fraus non est fallere fallentem.*[1] For the same reason the trusts in a fraudulent deed cannot be enforced.[2] The grantor, however, may maintain an action to enforce a vendor's lien for the purchase money, if the grantee does not set up the fraud as a defense.[3]

RELIEF WHEN THERE IS FRAUD ON DEBTOR.—The rule that a debtor is not entitled to any relief against a fraudulent conveyance only applies when the parties are *in pari delicto*. It is founded on principles of public policy for purposes of justice, and can never be made the means of sustaining an injustice. If the debtor, therefore, acts

[1] Anon. Cary, 25; Gaylord v. Couch, 3 Day, 223; Freeman v. Sedgwick, 6 Gill. 28; Canton v. Dorchester, 62 Mass. 525; Sweet v. Tinslar, 52 Barb. 271; Stewart v. Iglehart, 7 G. & J. 132; Wright v. Wright, 2 Litt. 8; Mulford v. ———, 2 Hayw. 244; James v. Bird, 8 Leigh, 510; Smith v. Elliott, 1 Pat. & H. 307; Hollis v. Morris, 2 Harring. 128; Payne v. Bruton, 10 Ark. 53; Jones v. Gorman, 7 Ired. Eq. 21; Peacock v. Terry, 9 Geo. 137; Galt v. Jackson, 9 Geo. 151; Ellington v. Currie, 5 Ired. Eq. 21; Britt v. Aylett, 11 Ark. 475; Lee v. Lee, 19 Mo. 420; Grider v. Graham, 4 Bibb. 70; Baldwin v. Cawthorne, 19 Ves. 166; Franklin v. Stagg, 22 Mo. 193; Martin v. Martin, 5 Bush, 47; Roane v. Vidal, 4 Munf. 187; Joyce v. Joyce, 5 Cal. 161; Jones v. Read, 3 Dana, 540; St. John v. Benedict, 6 Johns. Ch. 111; Baldwin v. Campfield, 8 N. J. Eq. 891; Marlatt v. Warwick, 19 N. J. Eq. 443; Lokerson v. Stillwell, 13 N. J. Eq. 357; Hershey v. Whiting, 50 Penn. 240; Holliday v. Holliday, 10 Iowa, 200; Eyre v. Eyre, 19 N. J. Eq. 42; Stephens v. Harrow, 26 Iowa, 458; Smith v. Boquet, 27 Tex. 507; Owen v. Sharp, 12 Leigh, 427; Cutter v. Tuttle, 19 N. J. Eq. 549; Hassam v. Barrett, 115 Mass. 256; Walton v. Tusten, 49 Miss. 599; Fletcher v. Fletcher, 2 MacArthur, 38; Gage v. Gage, 36 Mich. 229; Dunaway v. Robertson, 95 Ill. 419; Ryan v. Ran, 97 Ill. 38; Harrison v. Bailey, 14 S. C. 334; Nickodemus v. Nickodemus, 45 Mich. 385; Hood v. Frelison, 31 La. An. 577; *vide* Taylor v. Weld, 5 Mass. 109; Barnard v. Sutton, 12 L. J. Ch. (N. S.) 312; Smith v. ———, 2 Hayw. 229.

[2] Stewart v. Ackley, 52 Barb. 283; Sweet v. Tinslar, 52 Barb. 271; Murphy v. Hubert, 16 Penn. 50.

[3] Chapman v. Callahan, 66 Mo. 299.

under circumstances of oppression, imposition or undue influence, so that it appears that his guilt is subordinate to that of the grantee, equity will grant relief, not on account of any right in the debtor, but for the purpose of preventing the perpetration of a greater fraud by the grantee. The parties although *in delicto* are not *in pari delicto*, and a remedy is given on the ground of *mala fides* in the grantee and the necessity of preventing imposition. In these cases the debtor is not be regarded as having given his free unbiassed consent to the conveyance, and he is relieved on the ground that the conveyance is not strictly a valid conveyance because his mind and will have not sanctioned it. No man can be deemed a *particeps criminis* in a transaction unless he enters into it freely, and he does not so enter into it if he is driven into it by oppression or enticed into it by imposition or undue influence. This exception to the general rule will be made plainer by a few illustrations. If a man being weak of mind is induced to make a conveyance by a false representation of a liability when none exists, he is entitled to relief, although he made it for the purpose of avoiding such supposed liability, for in such case he is the victim of a gross misrepresentation.[1] If a debtor, being in a position where his property is liable to be sacrificed by a creditor, is induced by the latter to make a conveyance to him, relief will be granted on account of the oppression and undue influence.[2] Relief will be given where the grantee occupies a relation of confidence towards the debtor, who is a man of weak mind and in needy circumstances, and obtains a conveyance by the exercise of his ascendency arising from confidence and dependence.[3] So also if a *feme covert*

[1] Prewett v. Coopwood, 30 Miss. 369; Beale v. Hall, 22 Geo. 431.

[2] Austin v. Winston, 1 H. & M. 33; Keane v. Kyne, 2 Mo. Ap. 317.

[3] Dealty v. Murphy, 3 A. K. Marsh. 472; Poston v. Balch, 69 Mo. 115.

is induced by fraudulent practices of the grantee to unite with her husband in the conveyance of her own estate for the purpose of defrauding his creditors by depriving them of a remedy against his interest in it, she may have the transfer set aside.[1] If a debtor, being in embarrassed circumstances,[2] or incompetent to manage his affairs with prudence and discretion,[3] seeks the advice of an attorney and makes a conveyance to the latter under his advice, he is entitled to relief. In such a case the relief does not depend on the fact that the grantee is an attorney, except as it places him in a relation of trust and confidence to the debtor, but upon the undue influence and imposition practised by means of that relation. If the debtor, therefore, is a man of intelligence and large business experience, and by no means such a person as would be likely or liable to be inveigled, misled or unduly influenced by the fraudulent suggestion or advice of an attorney, and the whole transaction from the beginning to the end is a joint scheme, the one co-operating with the other and both being equally guilty, he is not entitled to relief.[4] These examples are sufficient to show that the exception to the general rule is established to prevent weak or necessitous men from being overreached, oppressed or defrauded, and it is kept strictly within these limits. In cases of this kind it is not material to inquire into the degrees of guilt of either party, for whether the debtor is more or less guilty than the grantee, the conveyance is alike defective for want of free mental sanction. Where the debtor, however, acts freely he is not entitled to relief, although he may not, in the forum

[1] Stewart v. Iglehart, 7 G. & J. 132.

[2] Goodenough v. Spencer, 2 T. & C. 509; Ford v. Harrington, 16 N. Y. 285.

[3] Freelove v. Cole, 41 Barb. 318.

[4] Roman v. Mali, 42 Md. 513.

of absolute justice, be quite so bad as the grantee.[1] Any attempt to inquire into the relative criminality of the parties in such a case would involve a determination of mere questions of morality, with which the law never deals. If the shades of difference, moreover, are slight, an attempt to measure their comparative demerits by a moral standard would be a difficult and speculative undertaking, and lead to metaphysical refinements not necessary to the attainment of practical justice. Nor does mere difference in mental capacity constitute a ground of relief where the debtor has sufficient capacity to make a valid contract, for there is no scale by which the grades of intellect of different men can be measured. The law therefore does not undertake to measure the size of men's understandings. It simply inquires whether he is possessed of legal capacity—whether he is able to know right from wrong—and if he is, refuses relief, although the grantee is his superior in intelligence.[2] Moreover, if it were necessary to gauge the intelligence and moral sense of the parties where they are *compotes mentis*, in order to ascertain their equality or inequality as moral and intelligent agents, and only apply the rule where the parties are exactly equal in their mental and moral attributes, the rule itself would be abrogated, for men are so differently constituted in their mental and moral endowments that no case would occur in which the parties would be exactly equal. The law, therefore, inquires not as to the propriety or impropriety of the conveyance, but as to the grantor's capacity to make it, and whether it was made freely with his full assent.

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[1] Renfrew v. McDonald, 18 N. Y. Supr. 254; Fletcher v. Fletcher, 2 MacArthur, 38; Trimble v. Doty, 16 Ohio St. 118.

[2] Smith v. Elliott, 1 Pat. & H. 307.

CERTAIN AGREEMENTS VALID.—In order to defeat an attempt to enforce a secret contract it is not necessary that any particular creditors shall be mentioned by name, or that the fraud shall be successful. The names of the creditors and the success of the fraud are merely matters of evidence.[1] If there is, however, no valid claim against the grantor, an agreement to reconvey may be enforced, although the transfer is made to defeat an anticipated recovery in an action against him. The statute only protects just and lawful actions, and if he is successful in his resistance to the demand the transfer can not be considered fraudulent, for he has a right to shield his property from all unlawful claims.[2] An arrangement made in good faith, by which a party purchases the debtor's property at a sale under an execution with a promise to reconvey to the debtor upon the payment of the purchase money, may be enforced.[3] If the parties voluntarily rescind the fraudulent conveyance, a subsequent arrangement between them in regard to the same property will not be tainted by the previous fraud.[4]

RIGHTS OF GRANTOR.—If the conveyance by mistake or through the fraud of the grantee conveys more property than the debtor intended to convey, he may maintain a suit in a court of equity to reform the deed. Though engaged in an illegal transaction, and unable to assert or

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[1] Blount v. Costen, 47 Geo. 534.

[2] Dearman v. Dearman, 4 Ala. 521; Brady v. Ellison, 2 Hayw. 348; Smith v. Bowen, 2 Hayw. 296; Baker v. Gilman, 52 Barb. 26; Boyd v. De La Montagnie, 73 N. Y. 498. *Contra*, Tantum v. Miller, 11 N. J. Eq. 551; Harris v. Harris, 23 Gratt. 737; Cameron v. Romille, 53 Tex. 238; Fletcher v. Fletcher, 2 MacArthur, 38.

[3] Fluharty v. Beatty, 4 W. Va. 514.

[4] Parker v. Tiffany, 52 Ill. 286; Matthews v. Buck, 43 Me. 265.

maintain any rights or remedies founded on the unlawful thing done or intended to be done, still he does not forfeit any right or privilege beyond that, or with respect to any other matter or thing not within the purpose of the wrongful act, and not affected by the corrupt intent or caused or produced in consequence of it. To the extent of his intended wrong he is without remedy, but in all other respects his rights and remedies are the same as if no such wrong had been done or intended. Though guilty of a wrong or transgression of the law in one particular, he does not become an outlaw or forfeit his right to legal protection in all others, nor lay himself open to the frauds and machinations of others to be practised against him with impunity. It must be clearly shown that the debtor seeks relief from the fruit of his own wrong or from the consequences of his own unlawful act before his action can be dismissed. If it be not these, but something outside and independent of his unlawful act or purpose, and not necessarily resulting from it nor caused or intended by him, and especially if it be something arising or produced by the fraudulent act or procurement of the grantee alone, then he is entitled to favorable consideration, and his action should be retained.[1] If the fraudulent transfer consists of a mortgage, the debtor may file a bill to redeem the property from its operation.[2] A bailor may maintain an action to recover the property although the bailment was made for the purpose of delaying, hindering or defrauding his creditors.[3]

Rights of Grantee.—If the transfer is made to two grantees, an agreement between them whereby one pur-

[1] Clemens v. Clemens, 27 Wis. 637.

[2] Smith v. Quartz Mining Co., 14 Cal. 242; Jones v. Rahilly, 16 Minn. 320.

[3] Gowan v. Gowan, 30 Mo. 472.

chases the property under a judgment, with the understanding that the title shall remain in the other, can not be enforced when it is a part of the original fraudulent scheme.[1] An agreement for a division, however, which has been acted upon, and upon the faith of which expenditures have been made, may be enforced.[2] If the fraudulent grantee executes the secret fraudulent trust under which he received the transfer, one *cestui que trust* can not defeat the full execution of the trust, nor appropriate the exclusive benefit to himself, by relying upon the fraudulent intent with which the transfer was made.[3] Equity will not decree a sale at the instance of one tenant in common when the land is incapable of partition, for the hazards of an unsound title should remain with those who have taken it.[4]

Actions at Law upon Executory Contracts.—The principles upon which a specific performance of an agreement to reconvey is refused apply also to an action at law upon such an agreement, or upon a note given as the consideration for a fraudulent transfer. There is a marked and settled distinction between executory and executed contracts of a fraudulent character. Whatever the parties to an action have executed for fraudulent purposes, the law refuses to lend its aid to enable either party to disturb. Whatever the parties have fraudulently contracted to execute, the law refuses to compel the contractor to execute or pay damages for not executing. In both cases it leaves the parties where

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[1] Waller v. Mills, 3 Dev. 515.

[2] Proseus v. McIntyre, 5 Barb. 424.

[3] Turner v. Campbell, 3 Gratt. 77; s. c. 1 P. & H. 256.

[4] Haydon v. Denslow, 27 Conn. 335.

it finds them.[1] A fraudulent note, whether under seal[2] or not,[3] can not be enforced, although the proof of the fraud comes from the maker. If a note constitutes the consideration for a fraudulent transfer, it will not be rendered valid by including an additional honest consideration, for the rule is that where one part of an entire contract is void the whole is void.[4] The maker may also show in an action upon such a note that the property has been taken away by the grantor's creditors,[5] but such a defense would not be good against a *bona fide* holder.[6] A receiver appointed in proceedings supplemental to an execution is not, however, a *bona fide* purchaser for value.[7] A third person who is innocent of the fraud may enforce a promise

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[1] Nellis v. Clark, 4 Hill, 424; s. c. 20 Wend. 24; Smith v. Hubbs, 10 Me. 71; Johnson v. Morley, Hill & D. Sup. 29; Niver v. Best, 10 Barb. 369; Walker v. McConnico, 10 Yerg. 228; Norris v. Norris, 9 Dana, 317; Roden v. Murphy, 10 Ala. 804; Walton v. Bonham, 24 Ala. 513; Harvin v. Weeks, 11 Rich. 601; Welby v. Armstrong, 21 Ind. 489; Powell v. Inman, 8 Jones (N. C.) 436; Church v. Muir, 33 N. J. 318; Merrick v. Butler, 2 Lans. 103; Starin v. Kelly, 36 N. Y. Sup. 366; Gordon v. Clapp, 113 Mass. 335; Ayer v. Duncan, 50 Cal. 325; McCausland v. Ralston, 12 Nev. 195; Hamilton v. Scull, 25 Mo. 165; Fenton v. Ham, 35 Mo. 409; Harwood v. Knapper, 50 Mo. 436; Goudy v. Gebbart, 10 Ohio St. 262. *Contra*, Findley v. Cooley, 1 Blackf. 262; Sherk v. Endress, 3 W. & S. 255; Telford v. Adams, 6 Watts, 429; Moore v. Thompson, 6 Mo. 353; Dyer v. Homer, 39 Mass. 253; Conner v. Carpenter, 28 Vt. 237; Carpenter v. McLure, 39 Vt. 9; Harvey v. Varney, 98 Mass. 118; Springer v. Drosch, 32 Ind. 486; Handy v. Phila. & Read. R. R. Co., 1 Phila. 31; O'Neil v. Chandler, 42 Ind. 471; Harris v. Harris, 23 Gratt. 737; Clemens v. Clemens, 28 Wis. 637; Dietrich v. Koch, 35 Wis. 618; Van Wy v. Clark, 50 Ind, 259; Davis v. Mitchell, 34 Cal. 81; Butler v. Moore, 73 Me. 151.

[2] Powell v. Inman, 7 Jones (N. C.) 28; Goudy v. Gebhart, 1 Ohio St. 262.

[3] Ayer v. Duncan, 50 Cal. 325; Goudy v. Gebhart, 1 Ohio St. 262; Merrick v. Butler, 2 Lans. 103.

[4] Niver v. Best, 10 Barb. 369.

[5] Dyer v. Homer, 39 Mass. 253; Bailey v. Foster, 26 Mass. 139.

[6] Gregory v. Harrington, 33 Vt. 241.

[7] Briggs v. Merrill, 58 Barb. 389.

made to him for a valuable consideration, although it grew out of the fraudulent transaction.[1] If a note and mortgage is given by the debtor to secure the amount found to be due upon the settlement of a business which the debtor has been permitted to carry on in the name of the mortgagor under a fraudulent agreement, it may nevertheless be enforced, for it is not tainted with fraud.[2]

ACTIONS AT LAW BY GRANTEE.—A fraudulent grantee has a legal title which he may enforce in an action at law, for the debtor and those claiming under him can not set up the fraud to avoid the transfer.[3] If the grantor becomes a tenant of the grantee, the grantee may maintain an action to recover the possession.[4] If the debtor, after the property has once been delivered, recovers the possession, the grantee may have the aid of the law to regain it.[5] The grantee may not only recover the property, but if that has been converted by the debtor to his own use, he may recover the value. When a mortgage is fraudulent, the mortgagee may enforce his legal right to the property by an action at law.[7] A fraudulent grantee[8] or mortgagee,[9]

[1] Moore v. Meek, 20 Ind. 484. [2] Heath v. Van Cott, 9 Wis. 516.

[3] Cushwa v. Cushwa, 5 Md. 44; Anderson v. Dunn, 19 Ark. 650; Ellis v. Higgins, 32 Me. 34; Murphy v. Hubert, 16 Penn. 50; Broughton v. Broughton, 4 Rich. 491; Jackson v. Garnsey, 16 Johns. 189; Gifford v. Ford, 5 Vt. 532; Starke v. Littlepage, 4 Rand. 368; Daniels v. Fitch, 8 Penn. 495; Epperson v. Young, 8 Tex. 135; McClenny v. Floyd, 10 Tex. 159; Gillespie v. Gillespie, 2 Bibb. 89; Goodwyn v. Goodwyn, 20 Geo. 600. [4] Tufts v. Du Bignon, 61 Geo. 322.

[5] Rochelle v. Harrison, 8 Port. 351.

[6] Hoeser v. Kraeka, 29 Tex. 450; Roberts v. Lund, 45 Vt. 82.

[7] Fitzgerald v. Forristal, 48 Ill. 228; Stores v. Snow, 1 Root. 181; Gifford v. Ford, 5 Vt. 532; Williams v. Williams, 34 Penn. 312; Bibb v. Baker, 17 B. Mon. 292; Bowman v. McKleroy, 14 La. An. 587.

[8] Mason v. Baker, 1 A. K. Marsh. 208; Caston v. Ballard, 1 Hill, 406; Gebhard v. Satler, 40 Iowa, 152; *vide* Greenwood v. Coleman, 34 Ala. 150.

[9] Shiveley v. Jones, 6 B. Mon. 274; Wearse v. Peirce, 41 Mass. 141; Demerritt v. Miles, 22 N. H. 523; Westfall v. Jones, 23 Barb. 9; Jones

however, can not enforce any claim to or against the property in a court of equity as against the debtor. The only remedy is at law. The only exception to this rule seems to be in a case where the grantee is deprived of his remedy at law by some subsequent act of the debtor.[1] A fraudulent assignee of a mortgage may, however, file a bill in equity to foreclose it.[2]

GRANTEE CAN NOT ENFORCE EXECUTORY CONTRACTS.—The principles of the law which prohibit any action upon a fraudulent executory contract apply equally to the grantee. A court of equity will not enforce an agreement to surrender a note given as the consideration upon a reconveyance of the property.[3] No action at law can be maintained upon a note given with a fraudulent mortgage,[4] or upon a covenant of warranty to recover damages when the property has been taken by the grantor's creditors.[5] Where a deed fails to describe the property through mistake, equity will not interfere to correct the mistake so as to enable the parties to consummate their purpose.[6]

SURRENDER TO DEBTOR.—If the grantee executes the contract to reconvey he will be bound, for the law will not then lend its aid to him.[7] When the reconveyance is in apparent execution of the fraudulent trust for the purpose of a sale, the fraudulent grantee can not claim the pro-

v. Comer, 5 Leigh, 350; Miller v. Marckle, 21 Ill. 152; Brookover v. Hurst, 1 Met. (Ky.) 665; *vide* Hess v. Final, 32 Mich. 515; Van Wy v. Clark, 50 Ind. 259; Holt v. Creamer, 34 N. J. Eq. 181.

[1] Baldwin v. Cawthorne, 19 Ves. 166.

[2] Guest v. Barton, 32 N. J. Eq. 120.

[3] Bryant v. Mansfield, 22 Me. 360; Servis v. Nelson, 14 N. J. Eq. 94.

[4] Brookover v. Hurst, 1 Met. (Ky.) 665.

[5] Surlott v. Beddow, 3 Mon. 109; Rea v. Smith, 19 Wend. 293.

[6] Gebhard v. Satler, 40 Iowa, 152.

[7] Dearman v. Radcliffe, 5 Ala. 192; Fargo v. Ladd, 6 Wis. 106; White v. Drocaw, 14 Ohio St. 339.

ceeds.[1] If the grantee is a minor and reconveys the property to the grantor during his minority, he can not avoid the deed of reconveyance upon attaining his majority, for the act was one which he ought to have done.[2] One grantee is not responsible to another for property which he has returned to the debtor.[3] If the grantee, upon reconveying the property, demands a certain price as a compensation for his services, the reconveyance, as between the parties, constitutes a good consideration therefor.[4] If he takes a mortgage to secure this sum, he may enforce it by foreclosure.[5] If he conveys the property to another upon a written trust which is not fraudulent on its face, the latter cannot set up the fraud as a defense against the enforcement of the trust.

GOOD AGAINST THIRD PARTIES.—The title of a fraudulent grantee is not only good against the debtor, but it is also good against all parties except creditors and their representatives. It is voidable only at the suit of creditors, and if no creditor interposes and complains, the transfer is as binding and effectual to pass the title as if made with the best intents and for the most innocent and commendable purposes.[7] The estate passes *toties quoties* by every subsequent conveyance, and is good against all the world except creditors in the possession of every successive grantee, even with notice of the fraud. The title is good against the debtor's tenant,[8] a prior mortgagee,[9] third

[1] Fargo v. Ladd, 6 Wis. 106.
[2] Starr v. Wright, 20 Ohio St. 97.
[3] Riddle v. Lewis, 7 Bush, 193.
[4] Maples v. Snyder, 2 T. & C. 318.
[5] Norton v. Pattee, 68 N. Y. 144.
[6] Fast v. McPherson, 98 Ill. 496.
[7] Hall v. Stryker, 9 Abb. Pr. 342; s. c. 29 Barb. 105; Bobb v. Woodward, 50 Mo. 95.
[8] Steadman v. Jones, 65 N. C. 388; Griffin v. Wardlaw, 1 Harp. Eq. 481; Moseley v. Moseley, 15 N. Y. 334; Cushwa v. Cushwa, 5 Md. 44.
[9] Hodson v. Treat, 7 Wis. 263; Stone v. Locke, 46 Me. 445; Stone v. Bartlett, 46 Me. 438; Fetrow v. Merriwether, 53 Ill. 275; Reid v. Mul-

parties who are not creditors,[1] a creditor of the grantor's creditor,[2] mere wrongdoers,[3] the grantee's own tenant[4] or bailee,[5] purchasers from the grantee so long as they refuse to surrender the property,[6] and stockholders when the transfer is made by a corporation.[7] A fraudulent assignee of a *chose in action* has a good title as against the party from whom the money is due, and can enforce the payment.[8] If a debtor has a note due to him cancelled, and

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lins, 48 Mo. 344; Powers v. Russell, 30 Mass. 69; Crooker v. Holmes, 65 Me. 195.

[1] Kid v. Mitchell, 1 N. & M. 334; Wade v. Green, 3 Humph. 547; Fowler v. Lee, 4 Munf. 373; Shadbolt v. Bassett, 1 Lans. 121; McGuire v. Faber, 29 Penn. 436; Anderson v. Bradford, 5 J. J. Marsh. 69; Clute v. Fitch, 25 Barb. 428; Van Etten v. Hurst, 6 Hill, 311; Johnson v. Jeffries, 30 Mo. 423; Hatch v. Bates, 54 Me. 136; Damon v. Bryant, 19 Mass. 411; Glassner v. Wheaton, 2 E. D. Smith, 352; Puryear v. Beard, 14 Ala. 121; Bessey v. Wyndham, 6 A. & E. (N. S.) 166; Schettler v. Brunette, 7 Wis. 197; Hall v. Snowhill, 14 N. J. 8; Paige v. O'Neal, 12 Cal. 483; Boyd v. Brown, 34 Mass. 453; McGuire v. Faber, 25 Penn. 436; Hopkins v. Webb, 9 Humph. 519; Johnson v. Elliott, 26 N. H. 67; Burgett v. Burgett, 1 Ohio, 482; Randall v. Phillips, 3 Mason, 378; Lenox v. Notrebe, 1 Hemp. 251; Simon v. Gibson, 1 Yeates, 291; Woodman v. Bodfish, 25 Me. 317; Hill v. Pine River Bank, 45 N. H. 300; Gardner v. Stell, 34 Tex. 561; Finley v. McConnell, 60 Ill. 259; Walton v. Tusten, 49 Miss. 599; Mellen v. Ames, 39 Iowa, 283; King v. Clay, 34 Ark. 291.

[2] Jones v. Hill, 9 Bush, 692.

[3] Worth v. Northam, 4 Ired. 102; Thompson v. Moore, 36 Me. 47; The Lion, 1 Sprague, 40; Costenbader v. Shumau, 3 W. & S. 504; Remington v. Bailey, 13 Wis. 332; Pierce v. Hasbrouck, 49 Ill. 26.

[4] Russell v. Fabyan, 27 N. H. 520; s. c. 34 N. H. 218.

[5] Hendricks v. Mount, 5 N. J. 738; Fairbanks v. Blackington, 26 Mass. 93.

[6] La Crosse R. R. Co. v. Seeger, 4 Wis. 268; Sharp v. Jones, 18 Ind. 314; Campbell v. Erie R. R. Co., 46 Barb. 540.

[7] Ashurst's Appeal, 60 Penn. 290.

[8] Pickens v. Hathaway, 100 Mass. 247; Ogden v. Prentice, 33 Barb. 160; Morey v. Forsyth, Walk. Ch. 465; Hamilton v. Gilbert, 2 Heisk. 680; Rohrer v. Turrill, 4 Minn. 407; Frenzel v. Miller, 37 Ind. 1; Stoner v. Comm., 16 Penn. 387; Gilmore v. Bangs, 55 Geo. 403; Sullivan v. Bonesteel, 79 N. Y. 631; Wood v. Steele, 65 Ala. 436.

takes a new note in the name of another, the latter can enforce it.[1]

CREDITORS MUST HAVE LEGAL PROCESS.—It is commonly said that a fraudulent conveyance is void against creditors, but this must be taken in a limited sense. The law provides a mode for determining the rights of all parties, and does not permit even a creditor to act as a judge in his own case.[2] Any other course would jeopardize the order and harmony of society. A fraudulent conveyance, moreover, does not confer any additional rights upon creditors. They can not seize the property of their debtor without any legal process, and appropriate it of their own accord to the satisfaction of their demands. Neither the general principles of law nor the particular laws which are enacted for the collection of debts confer any such rights upon them. They may cause it to be appropriated to the payment of their debts, but they can do this only in the mode which the law prescribes, and if they depart from that mode, their proceedings are unauthorized by law, and they thereby make themselves liable as wrongdoers to the owner of the property. Prior to the transfer they are liable to the debtor himself. After the transfer they are liable to the grantee, because all the rights of the debtor in relation to the property pass to him.

Consequently, the expression that a fraudulent transfer is void against creditors simply means that the rights of creditors as such are not, with respect to the property, affected by such transfer, but that they may, notwithstanding the transfer, avail themselves of all the remedies for collecting their debts out of the property or its avails which the law has provided in favor of creditors, and that

[1] Harding v. Colon, 123 Mass. 299. [2] Williford v. Conner, 1 Dev. 379.

in pursuing those remedies they may treat the property as though the transfer had not been made, that is, as the property of the debtor. The transfer is ineffectual to shield the property in the hands of the grantee from the just claims of the creditors of the grantor when those claims are prosecuted against it in the manner pointed out by the law. His title, however, is good against even creditors, unless they protect themselves against him by pursuing that prescribed course by which alone the property can be made available for the satisfaction of debts. A creditor at large, as it is termed, can not impeach the conveyance, but only a creditor having some process on which the property may be lawfully seized, and by which it is made liable, either immediately or ultimately, to be appropriated in satisfaction of his debt. Without such process he has no right to meddle with the property, and if he does so he is liable to all the consequences of an unlawful interference equally with any other person.[1]

If the creditor is in the possession of the property, he can not retain it on the ground of the indebtedness of the grantor to him.[2] In an action against him upon a *chose in action*, he can not show that an assignment of it is fraudulent.[3] If he is sued for the conversion of a note, he can not impeach a transfer thereof, although he holds a judg-

[1] Williford v. Conner, 1 Dev. 379; Hilzeim v. Drane, 18 Miss. 556; Owen v. Dixon, 17 Conn. 492; McGee v. Campbell, 7 Watts, 545; Dorsey v. Smithson, 6 H. & J. 61; Barton v. Vanheythuysen, 11 Hare, 126; s. c. 18 Jur. 344; Osborne v. Moss, 7 Johns. 161; Brown v. Gilmore, 16 How. Pr. 527; Carter v. Bennett, 4 Fla. 283; Pennington v. Woodall, 17 Ala. 685; Graser v. Stellwagon, 25 N. Y. 315; Eyrick v. Hetrick, 13 Penn. 488; Andrews v. Durant, 18 N. Y. 496; Whitfield v. Whitfield, 40 Miss. 352; Green v. Kornegay, 4 Jones (N. C.) 66.

[2] Dorsey v. Smithson, 6 H. & J. 61; Andrews v. Durant, 18 N. Y. 496; Barton v. Vanheythuysen, 11 Hare, 126; s. c. 18 Jur. 344; Eslow v. Mitchell, 26 Mich. 500.

[3] Ogden v. Prentice, 33 Barb. 160.

ment.[1] Before he can impeach the transfer he must have an execution, attachment, or some other legal process which authorizes the seizure of the property.[2] This process may be a warrant of distress,[3] or an attachment,[4] as well as an execution. The process, however, must be valid, and all the steps subsequent to the seizure which are prescribed by law for the disposition of the property must be pursued. The relation between the creditor at whose instance it is issued, and the officer who serves it, must not be sundered by such irregularities as render the proceeding void from the beginning.[5] Consequently the title of the grantee is good against a void attachment,[6] or an attachment which is not returned at the return term,[7] or a levy on a void judgment,[8] or a void levy,[9] or a levy after the return day of the writ,[10] or out of the officer's bailiwick,[11] or a purchaser under a void judgment,[12] or a

[1] Chickering v. Raymond, 15 Ill. 362.

[2] Andrews v. Durant, 18 N. Y. 496; Rinchey v. Stryker, 26 How Pr. 75; Schlussell v. Willett, 34 Barb. 615; s. c. 12 Abb. Pr. 397; s. c. 22 How. Pr. 15; Tiffany v. Warren, 37 Barb. 571; s. c. 24 How. Pr. 293.

[3] Allen v. Camp, 1 Mon. 231; Frost v. Mott, 34 N. Y. 253; Rinchey v. Stryker, 26 How. Pr. 75. *Contra*, Frisbey v. Thayer, 25 Wend. 396.

[4] Frost v. Mott, 34 N. Y. 253; Ward v. McKenzie, 33 Tex. 297; Morris v. House, 32 Tex. 492.

[5] Owen v. Dixon, 17 Conn. 492; Andrews v. Marshall, 43 Me. 272; s. c. 48 Me. 26; Eaton v. Cooper, 29 Vt. 444; Wooley v. Edson, 35 Vt. 214; *vide* Daggett v. Adams, 1 Me. 198; Johnston v. Harvey, 2 Penna. 82; Howland v. Ralph, 3 Johns. 20.

Halsey v. Christie, 21 Wend. 9; Zimmerman v. Lamb, 7 Minn. 421; Wanamaker v. Bowes, 36 Md. 42; Lyon v. Yates, 52 Barb. 237; Millar v. Babcock, 29 Mich. 526.

[7] Russ v. Butterfield, 60 Mass. 242. [8] Bean v. Loftus, 48 Wis. 371.

Cleaveland v. Deming, 2 Vt. 534; Barley v. Tipton, 29 Mo. 206; Russell v. Dyer, 40 N. H. 173; Davis v. Ranson, 26 Ill. 100; Candler v. Fisher, 11 Md. 332; Duryee v. Botsford, 31 N. Y. Supr. 317.

[10] Sheerer v. Lautzerheizer, 6 Watts, 543.

[11] McGee v. Campbell, 7 Watts, 545; Mangum v. Hamlet, 8 Ired. 44.

[12] Warren v. Hall, 6 Dana, 450; Carter v. Bennett, 4 Fla. 283; Hemphill v. Hemphill, 34 Miss. 68.

landlord who distrains before the rent is due,[1] or a fraudulent judgment,[2] or a judgment which has been satisfied.[3] It has, however, been held that if a debtor deposits money in bank in the name of another, the bank may set off its debt against the claim for the money.[4]

PROOF OF JUDGMENT AS WELL AS EXECUTION.—Whenever the validity of the seizure is put in controversy, the creditor or the officer, as the case may be, must establish a right to seize the property by proof which is adequate as against the grantee, and this in the case of an execution can only be done by the production of the judgment as well as the writ.[5] If the property is taken upon an attachment, there must be proof not only of the regularity of the attachment,[6] but of the demand of the creditor at whose instance the attachment was issued.[7] This is necessary in order to establish a right to seize the property. It is not necessary to prove the entire debt upon which

[1] Evans v. Herring, 27 N. J. 243.

[2] Wilhelmi v. Leonard, 13 Iowa, 330; Hackett v. Manlove, 14 Cal. 85.

[3] Chiles v. Bernard, 3 Dana, 95; Jackson v. Cadwell, 1 Cow. 622; Shinkle v. Letcher, 47 Ill. 217.

[4] Citizens' Bank v. Bowen, 21 Kans. 354.

[5] High v. Wilson, 2 Johns. 46; Wright v. Crockett, 7 Mo. 125; Dameron v. Williams, 7 Mo. 138; Eaton v. White, 2 Wis. 292; Paige v. O'Neal, 12 Cal. 483; Bickerstaff v. Doub, 19 Cal. 109; Martin v. Podger, 2 W. Bl. 701; S. C. 5 Burr. 2631; Hoffman v. Pitt, 5 Esp. 22; Reed v. Blades, 5 Taunt. 212; White v. Morris, 11 C. B. 1015; Glave v. Wentworth, 6 Q. B. 173; Ogden v. Hesketh, 2 Car. & K. 772; Ackworth v. Kempe, 1 Doug. 40; Luke v. Billers, 1 Ld. Raym. 733; M'Gowen v. Hoy, 5 Litt. 239; Cook v. Miller, 11 Ill. 610.

[6] Noble v. Holmes, 5 Hill, 194; Thornburgh v. Hand, 7 Cal. 554; Keys v. Grannis, 3 Nev. 548.

[7] Sanford v. Wiggin, 14 N. H. 441; Damon v. Bryant, 19 Mass. 411; Clute v. Fitch, 25 Barb. 428; Maley v. Barrett, 2 Sneed, 501; Currier v. Ford, 26 Ill. 488; Jones v. Lake, 2 Wis. 210; Cook v. Hopper, 23 Mich. 511; Mamlock v. White, 20 Cal. 598; Cook v. Miller, 11 Ill. 610.

the attachment issued,[1] or do more than show a *prima facie* right to issue the attachment without establishing the amount due.[2] The parties will not be liable to the grantee if the attachment is merely defeated by a plea of set-off.[3] A collusive demand, created merely for the purpose of attacking the transfer, can not prevail against it.[4]

DEED BY DEBTOR.—A deed from the debtor does not give the creditor any right to seize the property or any claim upon it. As the transfer binds the debtor he has no title that he can transmit. In the capacity of purchaser the creditor obtains no rights, and in the capacity of creditor he can only appropriate the property towards the satisfaction of his demand by virtue of some legal process.[5] Without a lien upon the property by virtue of some process, a creditor has no right to intervene in a suit.[6]

RATIFICATION BY CREDITOR.—A fraudulent transfer is merely voidable, and consequently is capable of confirmation, either by assent at the time or by a subsequent ratification, for no one can predicate fraud of facts which have his assent upon a full knowledge of them. As to him there is no fraud, for by his free act he assents to the transfer. *Preterea illud sciendum est, eum qui consentien-*

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[1] Walker v. Lovell, 28 N. H. 138. [2] Fuller v. Sears, 5 Vt. 527.

[3] Gates v. Gates, 15 Mass. 310. [4] Esty v. Long, 41 N. H. 103.

[5] Haines v. Campbell, 8 Wis. 187; Fox v. Willis, 1 Mich. 321; s. c. Walk. Ch. 535; Grimsley v. Hooker, 3 Jones Eq. 4; Barton v. Vanheythuysen, 11 Hare, 126; s. c. 18 Jur. 344; Tate v. Liggatt, 2 Leigh, 84; Jones v. Rahilly, 16 Minn. 320; Judge v. Vogel, 38 Mich. 569. *Contra*, Frost v. Goddard, 25 Me. 414; Woodward v. Solomon, 7 Geo. 246; Lee v. Brown, 7 Geo. 275; Pratt v. Cox, 22 Gratt. 330.

[6] Horn v. Volcano Water Co., 13 Cal. 62; Graser v. Steelwagon, 25 N. Y. 315; Williams v. Bizzell, 11 Ark. 718; Cox v. Fraley, 26 Ark. 20; Rhodes v. Cousins, 6 Rand. 188.

tibus creditoribus a fraudatore vel emit vel stipulatus est vel quid aliud contraxit, non videri in fraudem creditorum fecisse, nemo enim videtur fraudare eos qui sciunt et consentiunt[1] The grantor of a deed by which property that is paid for by the debtor is conveyed to another can not impeach it for fraud, because he is a party to the transaction.[2] A party who loans money to the debtor to enable him to buy the property can not impeach the conveyance if he knows that the property is to be conveyed to another.[3] A creditor under and by whose advice the transfer is made is, for the same reason, held to assent to and to be bound by it,[4] especially when he is an active participant in the fraud.[5] *Volenti non fit injuria.* If he is a party to the deed he can not impeach it.[6] A trustee who is also a creditor is estopped from assailing the deed under which he acts.[7] If a creditor is estopped, the estoppel will extend to a party who purchases under his judgment.[8]

SUBSEQUENT CONFIRMATION.—Although a creditor is not a party to a fraudulent transfer, yet he may subsequently elect to confirm it, for any one may dispense with a provision of the law which was made for his own protection. But before there can be any binding confirma-

[1] Dig. Lib. 42, Tit. 9, § 9.

[2] Phillips v. Wooster, 36 N. Y. 412; s. c. 3 Abb. Pr. (N. S.) 475; French v. Mehan, 56 Penn. 286.

[3] Thompson v. Thompson, 82 Penn. 378.

[4] Olliver v. King, 8 De G. M. & G. 110; s. c. 55 Eng. L. & Eq. 312; s. c. 25 L. J. Ch. 427; s. c. 2 Jur. (N. S.) 312; s. c. 1 Jur. (N. S.) 1067; Pell v. Tredwell, 5 Wend. 661; Baker v. Lyman, 53 Geo. 339; Scholey v. Worcester, 6 T. & C. 574; Sharpe v. Davis, 76 Ind. 17. *Contra*, Waterhouse v. Benton, 5 Day, 136.

[5] Smith v. Espey, 9 N. J. Eq. 160.

[6] Schenck v. Hart, 32 N. J. Eq. 774, 148.

[7] Strong v. Willis, 3 Fla. 124; Marshall v. Morris, 16 Geo. 368.

[8] Smith v. Espey, 9 N. J. Eq. 160; Sharpe v. Davis, 76 Ind. 17.

tion, he must have notice or knowledge of the facts which constitute the fraud.[1] If he has, however, been guilty of negligence in availing himself of information within his reach, constructive notice may be imputed to him.[2] Mere notice without any action on the part of the creditor,[3] or mere acquiescence by taking no present measures to interfere with the transfer,[4] does not amount to a confirmation, for he can be precluded from assailing the transfer only on the ground of estoppel or agreement; there must be a benefit conferred upon him, or a disadvantage suffered by the grantee such as can bind the conscience of the former or clothe his act with the character of a contract.[5] If, without consideration, he says that the transfer may stand, and the grantee does not act upon this statement in a manner different from what he otherwise would have done, or if the circumstances are such that he can retract what he says without prejudice to the grantee, he may still assail it.[6] But if with notice of the fraud either actual or constructive, he makes any agreement upon consideration confirming the transfer, or any statement or agreement to that effect, upon the faith of which the grantee acts as he would not otherwise do, or under such circumstances that his subsequent assertion of his rights as a creditor, if permitted, would operate as a fraud, he will be held to have confirmed the transfer.[7] The confirmation need not be

[1] Clarke v. Rowling, Hill & D. Sup. 105; Baldwin v. Tuttle, 23 Iowa, 66; Foulk v. McFarlane, 1 W. & S. 297; Van Nest v. Yoe, 1 Sandf. Ch. 4; Crutchfield v. Hudson, 23 Ala. 393.

[2] Scott v. Edes, 3 Minn. 377; Lane v. Lutz, 1 Keyes, 203; s. c. 3 Abb. Ap. 19.

[3] Derry Bank v. Davis, 44 N. H. 548; Cole v. Tyler, 65 N. Y. 73.

[4] Knauth v. Bassett, 34 Barb. 31; Jenness v. Berry, 17 N. H. 549; Annin v. Annin, 24 N. J. Eq. 184.

[5] Hayes v. Heidelberg, 9 Penn. 203. [6] Jenness v. Berry, 17 N. H. 549.

[7] Jenness v. Berry, 17 N. H. 549; Lane v. Lutz, 1 Keyes, 203; s. c. 3 Abb. Ap. 19; Johns v. Bolton, 12 Penn. 339; Dingley v. Robinson, 5

direct and express, but may be implied from the manner in which the parties deal with the property.[1] Each creditor has the right to elect for himself whether he will confirm the transfer or not, and can not be prejudiced by the acts of others.[2]

EXPRESS AGREEMENT.—If a creditor enters into a contract with the debtor and grantee whereby he affirms the validity of the conveyance, he can not afterwards impeach it.[3] He will also be estopped if he joins in a declaration of a trust made by the grantee to secure him, for he thereby recognizes the validity of the transfer. But if the acceptance of the grantee as surety for the debt has no reference to a connection with the transfer, it will not ratify it or estop him from impeaching it.[5] If, with full knowledge of the provisions of an assignment which is fraudulent on its face, he enters into an arrangement with other creditors concerning the disposition of the property or becomes a party to it, this is a confirmation of the assignment and estops him from assailing it.[6] But if goods are obtained from him under false pretenses and then fraudulently transferred to another, an agreement with

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Me. 127; Seymour v. Lewis, 13 N. J. Eq. 439; Tate v. Liggatt, 2 Leigh, 84; Okie v. Kelly, 12 Penn. 323; Irwin v. Longworth, 20 Ohio, 581; Renick v. Bank, 8 Ohio, 529; Myers v. Leinster, 7 Ired. Eq. 146; Bobb v. Woodward, 50 Mo. 95.

[1] Butler v. O'Brien, 5 Ala. 316.

[2] M'Allister v. Marshall, 6 Binn. 338; Litchfield v. Pelton, 6 Barb. 187; Geisse v. Beall, 3 Wis. 367.

[3] Tate v. Liggatt, 2 Leigh, 84; Lane v. Lutz, 1 Keyes, 203; s. c. 3 Abb. Ap. 19.

[4] Irwin v. Longworth, 20 Ohio, 581.

[5] Knapp v. White, 40 Wis. 143.

[6] Rapalee v. Stewart, 27 N. Y. 310; Bull v. Loveland, 27 Mass. 9; Fiske v. Carr, 20 Me. 301; Jones v. Dougherty, 10 Geo. 273; Burrows v. Alter, 7 Mo. 424; Geisse v. Beall, 2 Wis. 367; Reiff v. Eshleman, 52 Md. 582; *vide* Hurd v. Silsbee, 10 N. H. 108.

the fraudulent grantee to waive the false pretenses does not prevent an action to vacate the fraudulent sale.[1]

ACCEPTANCE OF PROCEEDS.—A creditor who receives the proceeds of a transfer with full knowledge of all the facts can not impeach it as fraudulent. His title to the proceeds depends upon the validity of the transfer, and he is therefore estopped from claiming the property, for the law does not permit any one to make repugnant claims.[2] Therefore if, for part payment of his debt, he receives a note given by the grantee as a part of the consideration of the transfer, having at the time a knowledge of the consideration, he will be held to confirm the transfer.[3] He will be equally estopped, although he obtains a part of the proceeds under proceedings supplemental to an execution.[4] If he receives a dividend under an assignment which is void on its face, he does so upon the implied condition that he will permit the whole assignment to take effect, and he is then precluded from impeaching it.[5] If he agrees not to assail the assignment if a certain sum is sent to him weekly till his debt is paid, and the debtor and trustee consent, and a part is remitted, he is held to take a benefit under it within the meaning of the rule.[6] An assignee in bankruptcy or insolvency is subrogated to the rights of creditors and confirms a transfer by receiving the arrears of an annuity given as a part of the consideration,[7]

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[1] Dingley v. Robinson, 5 Me. 127.

[2] Hathaway v. Brown, 22 Minn. 214.

[3] Butler v. O'Brien, 5 Ala. 316. [4] Lemay v. Bibeau, 2 Minn. 291.

[5] Adlum v. Yard, 1 Rawle, 163; Lanahan v. Latrobe, 7 Md. 268; Scott v. Edes, 3 Minn. 377; Richards v. White, 7 Minn. 345; Whitney v. Freeland, 26 Miss. 481; Gutzweiler v. Lackman, 23 Mo. 168; Moale v. Buchanan, 11 G. & J. 314; *vide* Vose v. Holcomb, 31 Me. 407; Crutchfield v. Hudson, 23 Ala. 393.

[6] Richards v. White, 7 Minn. 345. [7] Furness v. Ewing, 2 Penn. 479.

but a trustee claiming under an assignment for the benefit of creditors can not impeach a fraudulent transfer, and therefore cannot confirm it by taking the proceeds.[1] Where a creditor receives a part of the proceeds of a sale made by the grantee towards the payment of his debt, he confirms the transfer the same as if he received the proceeds of the sale to the grantee.[2] If an assignee in bankruptcy or insolvency receives the proceeds of a sale made by the grantee, this is also a confirmation of the transfer.[3] If a creditor accepts the balance arising from a fraudulent sale under a prior execution with full knowledge of all the facts, he thereby ratifies the sale and waives all objection to it.[4] A creditor can not consistently with reason be deemed to confirm a transfer by receiving the proceeds unless he knows that they are the proceeds and that the transfer is fraudulent, but if he retains the proceeds and uses them as his own after he acquires such knowledge, the same consequences result as if he acted on previous information [5]

No Confirmation without Consideration.—A confirmation must be founded upon a valuable consideration, and if there is no such consideration, a creditor is not precluded from impeaching a transfer.[6] A mere provision in an assignment in favor of a creditor does not of itself prevent him from assailing it, for an assignment when executed must bind all or none of the creditors.[7] Merely

[1] Furness v. Ewing, 2 Penn. 479.

[2] Renick v. Bank, 8 Ohio, 529; Seymour v. Lewis, 13 N. J. Eq. 439; Johns v. Bolton, 12 Penn. 339.

[3] Okie v. Kelly, 12 Penn. 323; Johns v. Bolton, 12 Penn. 339.

[4] Kilby v. Haggin, 3 J. J. Marsh. 208.

[5] Butler v. O'Brien, 5 Ala. 316. [6] Hayes v. Heidelberg, 9 Penn. 203.

[7] Smith v. Howard, 20 How. Pr. 121; O'Neil v. Salmon, 25 How. Pr. 246.

laying an attachment in the hands of the grantee does not confirm the transfer.[1] The mere fact that a receiver appointed in proceedings supplemental to an execution took possession of a note which was the consideration for the transfer, does not operate as a ratification of the transfer, nor estop the judgment creditor from levying on the property.[2] A party who bids at a sale under an execution issued against the grantee is not estopped from impeaching the transfer.[3] If a creditor accepts a part of the property which is subsequently taken from him, he may assail the transfer.[4] In order to operate as a confirmation, the act of the creditors must be intended to be a direct recognition and acknowledgment of the validity of the transfer, and not the result of a mere collateral arrangement.[5] If a debtor sells his goods in consideration of an annuity payable to his wife and a policy of insurance, a creditor who accepts of the policy as a security for his debt will not be estopped from attempting to have the annuity appropriated to the satisfaction of his demand.[6] If the creditor and grantee become tenants in common of the same ground, joining in a deed of partition does not estop the creditor from impeaching the conveyance.[7]

ASSIGNMENTS.—An assent to an assignment is coupled with the implied condition that other creditors shall also so agree. The hands of one creditor can not be tied by acquiescence while all the rest are left at liberty to prosecute their legal rights. Such a trust must be good as to

[1] M'Kee v. Gilchrist, 3 Watts, 230; Craver v. Miller, 65 Penn. 456; *vide* Bishop v. Catlin, 28 Vt. 71; Woodward v. Wyman, 53 Vt. 645.
[2] Briggs v. Merrill, 58 Barb. 389. [3] Wade v. Saunders, 70 N. C. 270.
[4] Lee v. Hunter, 1 Paige, 519. [5] Hayes v. Heidelberger, 9 Penn. 203.
[6] French v. French, 6 De G. M. & G. 95; s. c. 25 L. J. Ch. 612.
[7] Stout v. Stout, 77 Ind. 537.

all or void as to all. From its very nature it is entire, and incapable of separation and distribution, binding upon some while others are left free. If any one creditor proceeds against and sells the subject of the trust at law, both the legal and equitable title pass, and the trust is nullified as to all.[1] A creditor who has assented to the assignment may become a purchaser at the sale, and as his title will be derived from a source superior to the transfer, he will take the property discharged from it.[2]

Subsequent Creditors.—A creditor who has trusted his debtor after he has notice that the debtor has put his property out of his hands by a conveyance valid as between him and his grantee though voidable as to existing creditors, can never claim that the conveyance is fraudulent and void as to him on account of such indebtedness.[3] It has, however, been held that a person who afterwards signs an appeal bond upon an appeal from a judgment for a debt contracted before the conveyance, is not estopped from impeaching it although the fraud is disclosed to him at the time when he executes the bond.[4] If an assignment is assented to by all the creditors it can not be attacked by subsequent creditors, for the former have the right to elect to take the provision made for them, although

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[1] Hayes v. Heidelberg, 9 Penn. 203; Insurance Co. v. Wallis, 23 Md. 173.

[2] Hayes v. Heidelberg, 9 Penn. 203; *vide* McWhorter v. Huling, 3 Dana, 348.

[3] Baker v. Gilman, 52 Barb. 26; Chrisman v. Graham, 51 Tex. 454; Monroe v. Smith, 79 Penn. 459; Kane v. Roberts, 40 Md. 590; Kirksey v. Snedecor, 60 Ala. 192; Herring v. Richards, 3 Fed. Rep. 439; s. c. 1 McCreary, 570; Sheppard v. Thomas, 24 Kans. 780; Sledge v. Obenchain, 58 Miss. 670.

[4] Martin v. Walker, 19 N. Y. Supr. 46.

the assignment is fraudulent, and have a prior equity to be paid out of the property assigned.[1]

No Confirmation without Knowledge of the Fraud.—A confirmation to be effectual must be made with a knowledge, either actual or constructive, of the fraud as well as founded upon a valuable consideration, for no one can be deemed to assent to that of which he has no knowledge. The term assent of itself implies that the party has knowledge of that to which he assents. When the surplus of the money arising from a fraudulent sale under a prior execution is appropriated by law to a subsequent execution creditor who is in no way connected with the fraud, and receives it innocently and in ignorance of the fraud, he is not thereby prevented from attacking the sale.[2] A creditor who accepts a trust deed for his benefit from the fraudulent grantee of a part of the property is not estopped from assailing the transfer, unless he took his trust deed and claims thereunder with full knowledge of the fraud.[3] If he receives a dividend under an assignment upon a false statement, or without any knowledge of the fraud, he will not be thereby precluded from impeaching the assignment.[4]

Creditor must Return Benefit.—A creditor, however, who has received a benefit under a fraudulent transfer must return it before he can impeach the transaction. He may have his election either to confirm the transfer or attempt to avoid it, but he can not do both. By receiving

[1] Ames v. Blunt, 5 Paige, 13; Therasson v. Hickock, 37 Vt. 454; Ogden v. Prentice, 33 Barb. 160.

[2] Foulk v. M'Farlane, 1 W. & S. 297.

[3] Baldwin v. Tuttle, 23 Iowa, 66.

[4] Van Nest v. Yoe, 1 Sandf. Ch. 4; Crutchfield v. Hudson, 23 Ala. 393.

a benefit under the transfer claimed to be fraudulent, he thereby affirms it so as to be estopped from setting up the fraud. If he desires to rescind, he must rescind *in toto*. By receiving a benefit under the transfer he thereby becomes *pro tanto* a party to, and a participant in, the fraudulent transaction, from which he must show himself wholly clear before he is entitled to be heard to impeach it.[1]

ESTOPPEL FROM CONDUCT.—If a creditor signs a composition agreement and a receipt for the money, he can not assail a purchase by another who buys upon the faith of the agreement and to enable the debtor to settle with his creditors, although the money was not paid.[2]

CLAIMS MUST BE CONSISTENT.—A creditor must treat a transfer as altogether valid or altogether void. He can not hold it void in part and good in part, nor can he treat it as valid at one time and as void at another subsequent time.[3] If he sells the property under an execution and receives the proceeds, he can not afterwards resort to a note given as a consideration for the transfer.[4] If he takes the property under an execution, he can not also garnish the grantee.[5] But a mere levy on the property will not prevent the creditor from afterwards treating the transfer as valid.[6]

EFFECT OF CONFIRMATION.—If the creditors assent to a fraudulent assignment, it will be binding on the trustee, and he can not set up the fraud in an action against him to enforce its provisions.[7]

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[1] Lemay v. Bibeau, 2 Minn. 291; Scott v. Edes, 3 Minn. 377; Butler v. O'Brien, 5 Ala. 316; *in re* Wilson, 4 Penn. 430; Wills v. Munro, cited 43 Barb. 584.

[2] Kuhn v. Weil, 73 Mo. 213.

[3] Geisse v. Beall, 3 Wis. 367.

[4] Bradford v. Beyer, 17 Ohio St. 588.

[5] Clapp v. Rogers, 38 N. H. 435.

[6] U. S. v. Poole, 5 Fed. Rep. 412.

[7] Geisse v. Beall, 3 Wis. 367; Jones v. Dougherty, 10 Geo. 273.

TITLE IN DEBTOR.—The theory of the law is that a fraudulent transfer is void as against creditors.[1] For the purpose of enabling them to enforce their debts, the title is deemed to remain in the debtor as though the transfer had never been made, and they may levy on the property under an attachment[2] or execution,[3] and sell it as his property.

LIEN OF JUDGMENT.—If the creditors obtain judgments against the debtor after the transfer, they acquire liens upon his property wherever the same are given by law, according to the dates of their respective judgments, in the same manner precisely as if no transfer had been made, for the transfer is a nullity as against them, and the legal as well as the equitable title remains in the debtor for the purpose of satisfying his debts.[4] If the debtor becomes bankrupt after the rendition of a judgment against him, the lien is valid as against his assignee.[5] The lien of a

[1] Gooch's Case, 5 Co. 60.

[2] Platt v. Wheeler, 72 Mass. 520; Angier v. Ash, 26 N. H. 99.

[3] Campbell v. Jones, 25 Minn. 155; Wyman v. Richardson, 62 Me. 293; Scully v. Kearns, 14 La. An. 436; Gleises v. McHatton, 14 La. An. 560; Hager v. Shindler, 29 Cal. 47; Austin v. Bell, 20 Johns. 442; Chautauqua County Bank v. Risley, 19 N. Y. 369; Lowry v. Orr, 6 Ill. 70; Marston v. Marston, 54 Me. 476; Lane v. Sparks, 75 Ind. 278.

[4] M'Kee v. Gilchrist, 3 Watts, 230; Sanders v. Wagonseller, 19 Penn. 248; Beekman's Appeal, 38 Penn. 385; Hoffman's Appeal, 44 Penn. 95; Miner v. Warner, 2 Grant, 448; s. c. 2 Phila. 124; Jacoby's Appeal, 67 Penn. 434; Manhattan Co. v. Evertson, 6 Paige, 457; Morss v. Purvis, 5 T. & C. 140; Eastman v. Schettler, 13 Wis. 324; Chautauqua County Bank v. Risley, 19 N. Y. 369; Hubbs v. Bancroft, 4 Ind. 388. *Contra*, Miller v. Sherry, 2 Wall. 237; Lyon v. Robbins, 46 Ill. 276; Rappeleye v. International Bank, 93 Ill. 396; U. S. v. Griswold, 8 Fed. Rep. 556.

[5] Codwise v. Gelston, 10 Johns. 507; Wooten v. Clark, 23 Miss. 75; Davis v. Lumpkin, 57 Miss. 506; *in re* Beadle, 5 Saw. 351; Johnson v. Rogers, 15 N. B. R. 1. *Contra*, *in re* Estes & Carter, 3 Fed. Rep. 134; s. c. 5 Fed. Rep. 60.

judgment, however, is not a strict lien as it would be if there were no transfer, for the judgment does not of itself divest the title of the grantee. It is a mere *quasi* lien which is liable to be displaced by subsequent equities.[1] If the property is purchased in the name of another, a judgment against the debtor is not a lien thereon, for the title has never been in the debtor.[2]

GRANTEE'S CREDITORS.—The rights of the grantee's creditors are no higher than those of the grantee himself. They must claim through him, and not above or beyond him. Consequently he has no interest upon which the lien of judgments against him can attach so as to be entitled to priority over the liens of judgments against his grantor.[3] The grantee's assignee in bankruptcy has merely a defeasible title, subject to be defeated by the creditors of the grantor.[4] But a sale under an execution against the grantee will pass a good title as against the debtor.[5] If the creditors of the grantor seize[6] or sell the property under an execution, it is not afterwards liable to the creditors of the grantee. It has, on the other hand, been held that after an actual seizure by the creditors of the grantee the property can not be reclaimed by an officer acting under an execution against the grantor.[8] An assignee claiming under a fraudulent assignment made by

[1] Henderson v. Hunton, 26 Gratt. 926.

[2] Smith v. Inglis, 2 Oregon, 43.

[3] Haymaker's Appeal, 53 Penn. 306; Hoke v. Henderson, 3 Dev. 12.

[4] Pratt v. Wheeler, 72 Mass. 520.

[5] Robinson v. Monjoy, 7 N. J. 173; Wright v. Howell, 35 Iowa, 288.

[6] Mullanphy Savings Bank v. Lyle, 7 Lea. 431.

[7] Booth v. Bunce, 33 N. Y. 139; s. c. 24 N. Y. 592; s. c. 35 Barb. 496.

[8] Gibbs v. Chase, 10 Mass. 125; Parker v. Freeman, 2 Tenn. Ch. 612; Shallcross v. Deats, 43 N. J. 177.

a firm does not represent the partnership creditors, and can not interpose in their behalf to prevent the property from being taken upon a judgment against one of the partners for a separate debt.[1]

PURCHASER UNDER EXECUTION.—The purchaser at a sale under an execution acquires all the right, title and interest in the property which the debtor had prior to the transfer, is vested with the rights of the creditor, entitled to the same relief, and can protect his title against the frauds of the judgment debtor in the same manner and to the same extent that the judgment creditor might have done had he purchased. It is true that he holds as a purchaser and not as a judgment creditor, but as he represents a creditor he is entitled to the full benefit of the statute.[2] The inadequacy of the price does not affect the rights of the purchaser, for the parties to a fraudulent transaction have no cause to complain, because the cheapness of the purchase is due to the unwarrantable acts of the debtor himself in throwing a cloud over his title and thus causing a sacrifice of his property.[3] If the purchaser conveys the property to another, the latter will obtain a valid

[1] Jaques v. Greenwood, 12 Abb. Pr. 232.

[2] Pepper v. Carter, 11 Mo. 540; Barr v. Hatch, 3 Ohio, 527; Fishburne v. Kunhardt, 2 Speers, 556; Jones v. Crawford, 1 McMullan, 376; Russell v. Dyer, 33 N. H. 186; Sands v. Hildreth, 14 Johns. 493; S. C. 2 Johns. Ch. 35; Eastman v. Schettler, 13 Wis. 324; Duvall v. Waters, 1 Bland, 569; S. C. 11 G. & J. 37; Cole v. White, 26 Wend. 511; S. C. 24 Wend. 116; Wadsworth v. Havens, 3 Wend. 411; Carpenter v. Simmons, 1 Robt. 360; Thomson v. Dougherty, 12 S. & R. 448; Carter v. Castleberry, 5 Ala. 277; Douglass v. Dunlap, 10 Ohio, 162; Middleton v. Sinclair, 5 Cranch C. C. 409; Laurence v. Lippincott, 6 N. J. 473; Miller v. Tolleson, Harp. Ch. 145; Croft v. Arthur, 3 Dessau, 223; Lynn v. Le Gierse, 48 Tex. 138; Wagner v. Johns, 7 Daly, 375; Hager v. Shindler, 29 Cal. 47; Campbell v. Jones, 25 Minn. 155.

[3] Thomson v. Dougherty, 12 S. & R. 448; Hildreth v. Sands, 2 Johns. Ch. 35; S. C. 14 Johns. 493; Laurence v. Lippincott, 6 N. J. 473; Mullen v. Wilson, 44 Penn. 413; Rankin v. Harper, 23 Mo. 579; Lynn v. Le Gierse, 48 Tex. 138; McDonald v. Johnson, 48 Iowa, 72.

legal title as against the fraudulent grantee, for the title acquired at the sale under the execution can not be extinguished without a release or a conveyance.[1]

Proof of Title.—In order to establish his title, a purchaser must produce the judgment as well as the writ under which the property has been sold,[2] and when land is sold he must also show a deed from the officer who made the sale.[3] The rights which he acquires are simply those which the debtor had at the time of the transfer. Prior liens are not affected by the transfer, and, as he takes merely the quantity of interest which the debtor had, his title is subject to such liens.[4] It has been held that if the fraudulent transfer consists of a mortgage and one creditor merely levies upon and sells the equity of redemption, another creditor may levy upon and sell the whole property, and the purchaser at the second sale will obtain a valid title to the whole property.[5] The grantee can not set up a defect in the debtor's title for the purpose of defeating a recovery by a purchaser and thus retaining the property.[6]

Sale Subject to Transfer.—Whether a purchaser represents the rights of creditors will in some instances depend upon the interest that is sold. If the fraudulent transfer consists of a mortgage, a creditor may elect to treat it as valid and subsisting, and sell only the equity of

[1] Mulford v. Tunis, 37 N. J. 256.

[2] M'Creery v. Pursley, 1 A. K. Marsh. 114; Wright v. Crockett, 7 Mo. 125; Dameron v. Williams, 7 Mo. 138; Delesdernier v. Mowry, 20 Me. 150; Hyman v. Bailey, 13 La. An. 450.

[3] Hiney v. Thomas, 36 Mo. 377.

[4] Byrod's Appeal, 31 Penn. 241; Fisher's Appeal, 33 Penn. 294; Bobb v. Woodward, 50 Mo. 95.

[5] Bullard v. Hinkley, 6 Me. 289; McWhorter v. Huling, 3 Dana, 348.

[6] Zerbe v. Miller, 16 Penn. 488; *vide* Birge v. Nock, 34 Conn. 156.

redemption. The purchaser will not then represent the creditor's right to inquire into the consideration of the mortgage debt, or to impeach it upon any grounds not open to the debtor himself, and will gain no advantage whatever from the fact that the sale was by a sheriff on execution for the satisfaction of a debt.[1] If the debtor has been declared a bankrupt, the right to elect whether to affirm or avoid the mortgage can only be exercised by his assignee. He may either treat it as valid and sell only the equity of redemption, or he may elect to avoid it and sell the whole title to the property. If he sells merely the equity of redemption, the purchaser can not impeach the mortgage.[2] If, however, he elects to treat it as void he is not bound to incur the delay and expense necessarily incident to the prosecution to final judgment of legal proceedings to establish the invalidity of the mortgage, but may treat it as null and void, and sell and convey his whole interest in the mortgaged estate. The right to deny and contest the validity of the mortgage will in such case pass to the purchaser.[3]

When Tenant attorns to Assignee.—If the assignee in bankruptcy of a debtor who has made a fraudulent conveyance of land that is subject to a lease collects the rent from the tenant, the tenant may set up such payment as a defense to an action by the fraudulent grantee for the rent.[4]

No Levy on Profits or Proceeds.—The grantee has a valid title until the creditors, by asserting their rights

[1] Flanders v. Jones, 30 N. H. 154; Russell v. Dudley, 44 Mass. 147; McWhorter v. Huling, 3 Dana, 348.

[2] Tuite v. Stevens, 98 Mass. 305; Brewer v. Hyndman, 18 N. H. 9.

[3] Freeland v. Freeland, 102 Mass. 475; Dwinel v. Perley, 32 Me. 197; Gibbs v. Thayer, 60 Mass. 30; *vide* McMaster v. Campbell, 41 Mich. 513.

[4] Sexton v. Canny, 8 L. R. Ir. 216.

in due course of law, defeat it, and when defeated it is not rendered void *ab initio*, but only from the time of the levy of the execution under which the property is sold. Consequently he can not be made liable in an action at law for the mesne profits. For the same reason when land is fraudulently conveyed the creditors can not levy upon the crops subsequently produced by him,[1] or upon property which he has converted from realty into personalty, as for instance plaster dug from the ground or stone taken from a quarry,[2] unless they can show that his title to such personal property is merely colorable.[3] If the property consists of a furnace and iron works, no levy can be made on iron subsequently made by him at the furnace.[4] If the property is sold, the proceeds or other property received in exchange is not liable to an attachment or execution at law, for the statute only operates upon property conveyed by the debtor, and that which the grantee receives as a consideration for the sale never belonged to the debtor and is not within the statute. The only remedy in such a case is by a bill in equity.[5] If the grantee sells the property and deposits the money in bank, the latter can not set off its judgment against the grantor to the claim of the grantee.[6] If a crop, however, is growing upon the

[1] Jones v. Bryant, 13 N. H. 53; Heywood v. Brooks, 47 N. H. 231. *Contra*, Stehman v. Huber, 21 Penn. 260. 17 Wis. Com. Pl. 373

[2] Garbutt v. Smith, 40 Barb. 22.

[3] Dodd v. Adams, 125 Mass. 398; Furze v. Strohecker, 44 Mich. 337.

[4] Peters v. Leight, 76 Penn. 289.

[5] Lawrence v. Bank, 35 N. Y. 320; s. c. 3 Robt. 142; Tubb. v. Williams, 7 Humph. 367; Campbell v. Erie R. R. Co., 46 Barb. 540; Childs v. Derrick, 1 Yerg. 79; Richards v. Ewing, 11 Humph. 327; Kinghorn v. Wright, 45 N. Y. Sup. 615; Graham v. Rooney, 42 Iowa, 567. *Contra*, Abney v. Kingsland, 10 Ala. 355; Carville v. Stout, 10 Ala. 796; Lynch v. Welsh, 3 Penn. 294; Heath v. Page, 63 Penn. 280; French v Briedelman, 2 Grant, 319; Whitehall v. Crawford, 37 Ind. 147.

[6] Lawrence v. Bank, 35 N. Y. 320; s. c. 3 Robt. 142.

land at the time of the conveyance, a creditor may levy thereon without levying on the land.[1]

SUBSEQUENT EVENTS.—A creditor may treat a partition made by the grantee as legal on the ground that it was made by the debtor through the agency of the grantee by means of the deed, and at the same time insist that the deed is void so far forth as it is designed to defraud creditors.[2] As the statute operates upon the conveyance and not upon the estate transferred, the creditors will take all the estate which the debtor has at the time when they impeach the transfer, and not merely the interest transferred. If the debtor, at the time of the transfer, has a defeasible estate which subsequently becomes absolute, the whole estate is liable to his creditors.[3]

RIGHTS OF GRANTEE.—The right to redeem property sold under an execution belongs to the grantee and not to the debtor,[4] but the redemption will not give him a good title.[5] If the grantee gives a bond to dissolve an attachment levied upon the property and thus regains possession of it, his title is still liable to be impeached by other creditors.[6] It has also been held that the grantee does not get a good title even by a purchase at a sale under an execution.[7] The surplus that remains after satisfying an execution belongs to the grantee.[8]

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[1] Pierce v. Hill, 35 Mich. 194. [2] Staples v. Bradley, 23 Conn. 167.

[3] Flynn v. Williams, 7 Ired. 32; s. c. 1 Ired. 509.

[4] Russell v. Fabyan, 34 N. H. 218; s. c. 27 N. H. 520; Greenwald v. Roberts, 4 Heisk. 494.

[5] Ricker v. Ham, 14 Mass. 137; Williams v. Thompson, 30 Mass. 298.

[6] Jacobi v. Schloss, 7 Cold. 385.

[7] Spindler v. Atkinson, 3 Md. 409; s. c. 1 Md. Ch. 507.

[8] Taylor v. Williams, 1 Ired. 249; Williams v. Avent, 5 Ired. Eq. 47; Shorman v. Farmers' Bank, 5 W. & S. 373; Glassner v. Wheaton, 2 E.

DOWER.—The release of an inchoate right of dower which a married woman makes by joining in a conveyance with her husband operates against her only by estoppel. An estoppel must be reciprocal and binds only in favor of those who are privy thereto. A release of dower can be availed of then only by one who claims under the very title which was created by the conveyance with which the release is joined. When creditors set aside the deed from him as fraudulent, they do not connect themselves with the title which that deed has created and with which the release of dower is connected. They set up the title of the husband as it existed before the fraudulent conveyance and stand in hostility to the title which it has given. Not being parties to the release or in privity with it, they can not set it up in bar of the dower. When the deed is vacated her right to dower is revived.[1] In the case of a fraudulent mortgage she has a dower interest which may be assigned to her.[2] If the conveyance was made to her, her right to dower revives when the conveyance is set aside.[3] When property is fraudulently purchased in the name of another there is no dower interest in it.[4] If the conveyance was made before

D. Smith, 352; Waterbury v. Westervelt, 9 N. Y. 598; Bostwick v. Menck, 40 N. Y. 383.

[1] Mallonee v. Horan, 49 N. Y. 111; s. c. 12 Abb. Pr. (N. S.) 289; Belford v. Crane, 16 N. J. Eq. 265; Dugan v. Massey, 6 Bush, 81; Summers v. Babb, 13 Ill. 483; Robinson v. Bates, 44 Mass. 40; Lowry v. Fisher, 2 Bush, 70; Wyman v. Fox, 59 Me. 100; Woodworth v. Paige, 5 Ohio St. 70; Richardson v. Wyman, 62 Me. 280; Lockett's Adm. v. James, 8 Bush, 28; Ridgway v. Masting, 23 Ohio St. 294; Duvall v. Rollins, 71 N. C. 218; Cox v. Wilder, 7 N. B. R. 241; s. c. 5 N. B. R. 443; s. c. 2 Dillon, 132. *Contra*, Meyer v. Mohr, 19 Abb. Pr. 299; Manhattan Co. v. Evertson, 6 Paige, 457; Stewart v. Johnston, 3 Harrison, 87; Coppage v. Barnett, 34 Miss. 621.

[2] Harrison v. Campbell, 6 Dana, 263. [3] Humes v. Scruggs, 64 Ala. 40.

[4] Miller v. Wilson, 15 Ohio, 108.

marriage, she is not entitled to dower in the land when it is set aside.[1] If the conveyance is set aside, the husband of the grantee can not claim a tenancy by curtesy in the land.[2]

EXEMPTION.—As a fraudulent deed passes a good title as between the debtor and the grantee, the former is not entitled to a homestead[3] or exemption[4] out of the property, although the creditors set the deed aside as to all that is liable to be taken on execution.

RESCISSION.—The law does not deprive parties of the power of repentance, but rather encourages them to abandon fraudulent conveyances and make honest bargains instead of them. The grantee will not be liable to creditors if he restores the property to the debtor,[5] or applies it to the payment of the grantor's debts.[6] The parties may also rescind the fraudulent contract and enter

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[1] King v. King, 61 Ala. 479; Gross v. Lange, 70 Mo. 45; Whithead v. Mallory, 58 Miss. 138. [2] Piper v. Johnston, 12 Minn. 60.

[3] Sumner v. Sawtelle, 8 Minn. 309; Stancill v. Branch, 1 Phillips, 306; Getzler v. Saroni, 18 Ill. 511; Cassell v. Williams, 12 Ill. 387; Keating v. Keefer, 5 N. .R. 133; *in re* Dillard, 9 N. B. R. 8; Gibbs v. Patten, 2 Lea, 180; Piper v. Johnson, 12 Minn. 60. *Contra*, Bartholomew v. West, 8 N. B. R. 12; S. C. 2 Dillon, 90; Cox v. Wilder, 7 N. B. R. 241; S. C. 2 Dillon, 132; S. C. 5 N. B. R. 443; Penny v. Taylor, 10 N. B. R. 200; McFarland v. Goodman, 6 Biss. 111; S. C. 11 N. B. R. 134; Vogler v. Montgomery, 54 Mo. 577; Sears v. Hanks, 14 Ohio St. 298; Thomason v. Neeley, 50 Miss. 310; Newman v. Willets, 52 Ill. 98; Pennington v. Seal, 49 Miss. 518; Edmonson v. Meacham, 50 Miss. 34; Knevan v. Specker, 11 Bush, 1; State v. Diveling, 66 Mo. 375; Jaffers v. Aneals, 91 Ill. 487; Turner v. Vaughan, 33 Ark. 454; Bennett v. Hutson, 33 Ark. 762.

[4] Huey's Appeal, 29 Penn. 219; Carl v. Smith, 28 Leg. Int. 366; Stevenson v. White, 87 Mass. 148; *in re* Graham, 2 Biss. 449; *vide* Vaughan v. Thompson, 17 Ill. 78.

[5] Cramer v. Blood, 57 Barb. 155; S. C. 48 N. Y. 684.

[6] Hutchins v. Sprague, 4 N. H. 469; Kaupe v. Bridge, 2 Robt. 459; Crowninshield v. Kittridge, 48 Mass. 520.

into a new contract for a sale or other transfer of the property, and if the latter is made in good faith and for a valuable consideration it will not be contaminated by the fraud in the first.[1] If property is purchased in part with funds furnished by the debtor and in part by the grantee, it may be sold and the grantee's share invested in other property.[2] Although a mortgage is fraudulent, yet if the property is sold and the proceeds applied to pay the debt, other creditors can not afterwards raise any objections.[3] The grantor and the grantee may also unite in a transfer of the property to a *bona fide* purchaser, and he will acquire all the rights of both, and will not be necessarily affected by any illegality in the first transfer.[4]

THERE MUST BE RESTITUTION.—There is no valid repentance, however, without an entire restitution where this is possible. All the benefits of the fraudulent arrangement must be abandoned. A transfer can not be purified by merely abandoning the fraudulent purpose for which it was given and using it for an honest one.[5] If a transfer is fraudulent, the subsequent payment in full of the purchase money will not render it valid.[6] So also if the transaction

[1] King v. Cantrell, 4 Ired. 251; Merrill v. Meachum, 5 Day, 341; Matthews v. Buck, 43 Me. 265; Borland v. Mayo, 8 Ala. 104; White v. White, 13 Ired. 265; Thrall v. Spencer, 16 Conn. 139; Waller v. Todd, 3 Dana, 503; Oriental Bank v. Haskins, 44 Mass. 332; Harvey v. Mix, 24 Conn. 406; *vide* Halcombe v. Ray, 1 Ired. 340.

[2] Allen v. Holland, 3 Yerg. 343.

[3] Roane v. Bank, 1 Head, 526; Stoddard v. Butler, 7 Paige, 163; s. c. 20 Wend. 507; Peacock v. Tompkins, Meigs, 317.

[4] Eaton v. Campbell, 24 Mass. 10; Breckinridge v. Anderson, 3 J. J. Marsh. 710; Gridley v. Wynant, 23 How. 500; Brown v. Riley, 22 Ill. 45; Wall v. White, 3 Dev. 105; White v. White, 13 Ired. 265; Parker v. Crittenden, 37 Conn. 148.

[5] Bunn v. Ahl, 29 Penn. 387; Sparks v. Mark, 31 Ark. 666.

[6] Borland v. Mayo, 8 Ala. 104; Chenery v. Palmer, 6 Cal. 119.

is merely colorable it will not be purged by any subsequent payment or advances in part without rescinding the whole, whether made to the debtor or the creditors. If any part of the fraudulent purpose remains it vitiates the whole.[1] A consideration paid at the time when a party assents to a deed placed on record without his knowledge is not, however, a subsequent consideration.[2]

ADMINISTRATOR.—If the grantee dies before a rescission of a transfer, the personal property will vest in his personal representatives, and no return can be made which will interfere with their rights.[3] When a judgment is confessed for certain articles in favor of an administrator, accompanied with a secret trust, the trust is void, and the distributees may require the enforcement of the judgment.[4]

ASSIGNEE.—If the debtor subsequently makes an assignment, the creditors may still have the fraudulent transfer set aside, for he can not transfer any right to his assignee which he himself does not possess.[5]

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[1] Wood v. Hunt, 38 Barb. 302; Danjean v. Blacketer, 13 La. An. 595; Lynde v. McGregor, 95 Mass. 182; Stone v. Grubbam, 2 Bulst. 217; s. c. 1 Rol. Rep. 3; Law v. Payson, 32 Me. 521; Halcombe v. Ray, 1 Ired. 340.

[2] Smith v. Epsy. 9 N. J. Eq. 160. [3] Dearman v. Radcliffe, 5 Ala. 192.

[4] Kavanaugh v. Thompson, 16 Ala. 817.

[5] Brownell v. Curtis, 10 Paige, 210; Browning v. Hart, 6 Barb. 91; Storm v. Davenport, 1 Sandf. Ch. 135; Thomson v. Dougherty, 12 S. & R. 448; Vandyke v. Christ, 7 W. & S. 373; Leach v. Kelsey, 7 Barb. 466; Esterbrook v. Messersmith, 18 Wis. 545; Maiders v. Culver, 1 Duval, 164; Van Keuren v. McLaughlin, 21 N. J. Eq. 163; Luckenbach v. Brickenstein, 5 W. & S. 145; Rogers v. Fales, 5 Penn. 154; Pillsbury v. Kingon, 31 N. J. Eq. 619; Flower v. Cornish, 25 Minn. 473; Mann v. Flower, 25 Minn. 500; Heinrich v. Woods, 7 Mo. Ap. 236; *vide* Englebert v. Blanjot, 2 Whart. 240; Swift v. Thompson, 9 Conn. 63; Galt v. Dibrell, 10 Yerg. 146; Gaylor v. Harding, 37 Conn. 508; Rood v. Welch, 28 Conn. 157; Shipman v. Ætna Ins. Co., 29 Conn. 245; Bayard v. Hoffman, 4 Johns. Ch. 450.

PRIOR INTERESTS NOT EXTINGUISHED.—If creditors avoid the conveyance, the law remits and restores the grantee to his previously existing legal rights. A prior interest will not be deemed to be merged in an estate which has been lost, for the law will not consider a deed to be in force which has been avoided. When a grantee loses an interest which he obtained fraudulently, it is to him as if it had never existed. This gives the statute its proper and legitimate effect, permits the grantee to hold nothing by his fraudulent contract, and the creditors to take all their debtor fraudulently conveyed, and nothing more. The very avoiding of the fraudulent conveyance revives and renews the former interest and restores the parties to their original position. If the transfer consists of a release of an equity of redemption, the mortgage is revived when it is set aside.[1] Although an indorsement on a mortgage is fraudulent, yet when that is set aside the mortgage will be valid.[2] The dower of the debtor's wife will be revived when a deed from the grantee to her is vacated.[3] If the grantee purchases a prior mortgage he will be entitled to retain it after the fraudulent transfer has been set aside.[4] A fraudulent mortgage does not extinguish the debt for which it was given, and if the security fails the debt remains in full force. As it did not arise *ex turpi causa*, it can not be merged by anything merely collateral.[5]

[1] Ladd v. Wiggin, 35 N. H. 421; Mead v. Combs, 19 N. J. Eq. 112; Stokoe v. Cowan, 29 Beav. 637; Ripley v. Severance, 23 Mass. 474; Britt v. Aylett, 11 Ark. 475; Towle v. Hoitt, 14 N. H. 61; Irish v. Clayes, 10 Vt. 81; Stedman v. Vickery, 42 Me. 132; Daniel v. Morrison, 6 Dana, 182; s. c. 6 J. J. Marsh. 398; *vide* Clayborn v. Hill, 1 Wash. (Va.) 177.

[2] Whithed v. Pillsbury, 13 N. B. R. 241.

[3] Roberts v. Jackson, 1 Wend. 478; Humes v. Scruggs, 64 Ala. 40.

[4] Mallonee v. Horan, 49 N. Y. 111; s. c. 12 Abb. Pr. (N. S.) 289; Bobb v. Woodward, 50 Mo. 95; Towle v. Hoitt, 14 N. H. 61.

[5] Haven v. Low, 2 N. H. 13.

VOID IN PART IS VOID IN TOTO.—If a part of the consideration for a transfer is merely a nominal or colorable consideration, contrived to hinder, delay, or defraud creditors, the whole transfer is void.[1] If a man who has goods but of the value of £30 is indebted to two men, viz. to one in £20 and to another in £10, and the debtor transfers all his goods to him to whom he owes £10, to the intent that for the residue above the £10 he shall be favorable unto him, the sale is altogether void, for it is fraudulent in part.[2] So also if a creditor takes a mortgage,[3] or a judgment,[4] or issues an attachment,[5] for more than is due, the fraud corrupts and destroys the whole. There must, however, be fraud to bring a case within this principle. If there is no fraud or wrong done, or attempted, or intended to be done, the principle does not apply. If an attachment or judgment is taken for too much inadvertently, and the creditor has no purpose of obtaining any more than is due to him, it will be valid.[6]

FRAUDULENT AS TO PART OF THE PROPERTY.—If a mortgage is made with the intent to secure a part of the pro-

[1] Floyd v. Goodwin, 8 Yerg. 484; Marriott v. Givens, 8 Ala. 694; Tatum v. Hunter, 14 Ala. 557; Burke v. Murphy, 27 Miss. 167; McKenty v. Gladwin, 10 Cal. 227; Scales v. Scott, 13 Cal. 76; Fiedler v. Day, 2 Sandf. 594; Mead v. Combs, 19 N. J. Eq. 112; Hall v. Heydon, 41 Ala. 242; Albee v. Webster, 16 N. H. 362; Coolidge v. Melvin, 42 N. H. 510; Johnson v. Murchison, 1 Wiust. 292; *vide* Gicker v. Martin, 50 Penn. 138.

[2] Wilson & Wormal's Case, Godbolt, 161.

[3] Holt v. Creamer, 34 N. J. Eq. 181; Heintze v. Bentley, 34 N. J. Eq. 562.

[4] Pierce v. Partridge, 49 Mass. 44; Whiting v. Johnson, 11 S. & R. 328; Fryer v. Bryan, 2 Hill Ch. 56; Bowie v. Free, 3 Rich. Eq. 403; Dickinson v. Way, 3 Rich. Eq. 412; Gates v. Johnson, 3 Penna. 52.

[5] Fairfield v. Baldwin, 29 Mass. 388; Taaffe v. Josephson, 7 Cal. 352; Hale v. Chandler, 3 Mich. 531; Harding v. Harding, 25 Vt. 487.

[6] Felton v. Wadsworth, 61 Mass. 587; Ayres v. Husted, 15 Conn. 504; Shedd v. Bank, 32 Vt. 709; Davenport v. Wright, 51 Penn. 292; Wilder v. Fondey, 4 Wend. 100; Harris v. Alcock, 10 G. & J. 226.

perty to the mortgagee, and to cover the residue for the use of the debtor, it is void as to the whole. To render an instrument valid it must be given in good faith, and without any intent to hinder or defraud creditors. This can not be true when the object as to a part of the property is to defraud creditors. This unlawful design vitiates the entire instrument. The unlawful design can not be confined to one particular parcel of property. Entire honesty and good faith are necessary to render the instrument valid, and whenever it appears that one object was to defraud creditors, the entire deed is in judgment of law void.[1] When fraud, however, is imputed from the mere omission to deliver the possession of the property to the grantee, the transfer will be good as to the articles which are delivered, although it may be void as to the residue.[2]

A Fraudulent Stipulation.—A fraudulent stipulation in a written instrument vitiates the entire instrument. The taint as to a part makes the whole void. Wherever an instrument is good in part and fraudulent in part, it is

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[1] Russell v. Winne, 37 N. Y. 591; s. c. 4 Abb. Pr. (N. S.) 384; Divver v. McLaughlin, 2 Wend. 596; Ticknor v. Wiswall, 9 Ala. 305; Goodhue v. Berrien, 2 Sandf. Ch. 630; Darwin v. Handley, 3 Yerg. 502; Young v. Pate, 4 Yerg. 164; Sommerville v. Horton, 4 Yerg. 541; Swinford v. Rogers, 23 Cal. 233; Harman v. Hoskins, 56 Miss. 142; *vide* Shurtleff v. Willard, 36 Mass. 202; Chase v. Walker, 26 Me. 555; Barnet v. Fergus, 51 Ill. 352; *in re* Kahley et al., 2 Biss. 383; s. c. 4 N. B. R. 378; Allen v. Brown, 43 Geo. 305; *in re* Perrin, 7 N. B. R. 283; Donnell v. Byern, 69 Mo. 468; *in re* Kirkbride, 5 Dill. 116; *in re* Geo. P. Morrill, 2 Saw. 356; s. c. 8 N. B. R. 117.

[2] De Wolf v. Harris, 4 Mason, 515; s. c. 4 Pet. 147; De Bardleben v. Beekman, 1 Dessau. 346; Brown v. Foree, 7 B. Mon. 357; Weller v. Wayland, 17 Johns. 102; Lee v. Huntoon, Hoff. 447; Spaulding v. Austin, 2 Vt. 555; Hessing v. McCloskey, 37 Ill. 341.

void altogether, and no interest passes under the part which is good.[1]

SEVERAL GRANTEES.—The same instrument may be evidence of a gift, grant, or conveyance to different individuals and for different objects, and may be invalid as to one of the grantees without affecting the other. They may be so disconnected in respect to the consideration that the fraud of one can not implicate the other in any dishonest purpose. If, for instance, a deed is made to secure two distinct claims, one of which is real and the other fictitious, it will be void as to the fraudulent grantee and valid as a security for the claim of the innocent grantee.[2] If, however, the grantee who has a valid claim knows at the time of the execution of the deed that the other claim is fictitious, the deed will be void as to both grantees.[3] Where a sheriff holds two executions, one of which is valid and the other fraudulent, a sale will be referred to that which is valid, and even the fraudulent execution creditor will obtain a good title by purchase at the sale if he does not receive any benefit from the proceeds.[4]

VALID FOR SOME PURPOSES.—A fraudulent recovery stands good to bar those in remainder or reversion, as if

[1] Hyslop v. Clarke, 14 Johns. 458; Mackie v. Cairns, 5 Cow. 547; s. c. 1 Hopk. 373; Goodrich v. Downs, 6 Hill, 438; Albert v. Winn, 7 Gill. 446; s. c. 5 Md. 66; s. c. 2 Md. Ch. 42, 169; McClurg v. Lecky, 3 Penna. 83; Robins v. Embry, 1 S. & M. Ch. 207; Jacot v. Corbett, 1 Chev. Eq. 71; Howell v. Edgar, 4 Ill. 417; Dana v. Lull, 17 Vt. 390; Caldwell v. Williams, 1 Ind. 405; Pierson v. Manning, 2 Mich. 445; Green v. Branch Bank, 33 Ala. 643; Greenleaf v. Edes, 2 Minn. 264; Palmer v. Giles, 5 Jones Eq. 75; Spies v. Boyd, 1 E. D. Smith, 445.

[2] Prince v. Shepard, 26 Mass. 176; Anderson v. Hooks, 9 Ala. 704; Gary v. Colgin, 11 Ala. 514; Smith v. Post, 3 T. & C. 647; Troustine v. Lask, 4 Baxter, 162; *vide* Pettibone v. Phelps, 13 Conn. 445; Esterbrook v. Messersmith, 18 Wis. 545.

[3] Lewis v. Caperton, 8 Gratt. 148; Swartz v. Hazlett, 8 Cal. 118.

[4] Gregg v. Bigham, 1 Hill (S. C.) 299.

there had been no fraud. The deed declaring the uses is void. The recovery stands as a recovery simply without any deed to lead or declare the uses.[1] When the fraud consists in the creation of an annuity upon a consideration paid by the debtor to the grantor, the instrument is not void so far as it creates the annuity, but it is void so far as it directs who shall take the benefit.[2] Although a debtor refuses to take a deed for land purchased by him for the purpose of defrauding his creditors, the agreement will be valid against the creditors of the vendor.[3] If a note is taken in the name of another, the maker, when innocent of the fraud, can not be held liable to creditors.[4]

[1] Tarleton v. Liddell, 17 Q. B. 390; s. c. 4 DeG. & Sim. 538.

[2] Shee v. French, 3 Drew, 716; Neale v. Day, 28 L. J. Ch. 45; French v. French, 6 DeG. M. & G. 95; s. c. 25 L. J. Ch. 612; Wakefield v. Gibbon, 1 Giff. 401.

[3] Cutting v. Pike, 21 N. H. 347.

[4] Patterson v. Whittier, 19 N. H. 192.

CHAPTER XVII.

BONA FIDE PURCHASERS.

PURCHASER AS WELL AS GRANTEE PROTECTED.—*Is qui a debitore cujus bona possessa sunt sciens rem emit iterum alii bona fide ementi vendidit. Quæsitum est an secundus emptor conveniri potest; sed verior Sabini sententia bona fide emptorem non teneri; quia dolus ei duntaxat nocere debeat qui eum admisit.*[1] The principle that fraud is only prejudicial to him who participates in it is also recognized by the statute. The proviso protects all interests and estates lawfully conveyed or assured upon good consideration and *bona fide* to a person who, at the time of such conveyance or assurance, has no manner of notice or knowledge of the covin, fraud or collusion. These terms are broad and extensive. They apply to any conveyance, whether from the fraudulent grantor or fraudulent grantee. They are meant to protect a *bona fide* purchaser for a valuable consideration without notice of the fraud from the operation of the statute. This is manifest as well from the internal evidence of the proviso as from the plainest maxims of equity and justice. The proviso is general. It exempts any conveyance upon good consideration and *bona fide* to any person not having notice of the fraud or collusion from the effect of the statute. Its benefits therefore extend to any *bona fide* purchaser for valuable consideration, whether he purchases from the

[1] Dig. Lib. 42, tit. 9; 3 Pothier Pand. Lib. 42, tit. 8, art. 3, § 25, p. 195.

fraudulent grantor or the fraudulent grantee.[1] The great object of the law is to afford certainty and repose to titles honestly acquired. It is of no public utility to destroy titles so acquired on account of the taint of a prior secret fraud, which may be unsuspected and unknown, and which, probably, no diligence could detect. A purchaser who pays a fair price for an ostensibly fair title without notice of any latent fraud in any previous link of the title has a higher equity than the creditors. They may lose their debts; if they can recover the property from him he may lose the money which he paid for it. The equities between them are equal, and he has the legal title, and consequently the prior right, for the law never divests one of a legal title in order to invest another with it where there are no equitable reasons for so doing. He will therefore hold the estate purged of the anterior fraud that infected the title.[2]

VOIDABLE ONLY.—The statute, it is true, declares a fraudulent transfer to be clearly and utterly void, frustrate and of none effect. There is a distinction, however, between a transfer which is an absolute nullity and one which is voidable only. No transfer can be pronounced in a legal sense utterly void which is valid as to some persons but may be avoided at the election of others. A thing is void which is done against law at the very time of doing it, and where no person is bound by the act; but a thing is voidable which is done by a person who ought not to have done it, but who nevertheless can not avoid it

[1] Anderson v. Roberts, 18 Johns. 515; s. c. 2 Johns. Ch. 372; Mateer v. Hissim, 3 Penna. 160; Bean v. Smith, 2 Mason, 252; Martin v. Cowles, 1 Dev. & Bat. 29.

[2] Lee v. Abbe, 2 Root, 359; Bean v. Smith, 2 Mason, 252; Martin v. Cowles, 1 Dev. & Bat. 29.

himself after it is done. Whenever the act done takes effect as to some purposes, and is void as to persons who have an interest in impeaching it, the act is not a nullity, and therefore in a legal sense is not utterly void, but merely voidable.[1] The transfer, however, is good between the parties. As against the debtor it is effectual, and the fraudulent grantee has a title and a right to alienate. The only infirmity in his title is its liability to be impeached by creditors. As to all others it is perfect, and when it has passed into the hands of an innocent holder, even this infirmity is cured and the title becomes sound and indefeasible.[2] There is no distinction in this respect between actual and constructive fraud.[3]

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[1] Anderson v. Roberts, 18 Johns. 515; s. c. 2 Johns. Ch. 372; Martin v. Cowles, 1 Dev. & Bat. 29.

[2] George v. Kimball, 41 Mass. 234; Gridley v. Wynant, 23 How. 500; Wilson & Wormal's Case, Godbolt, 161; Martin v. Cowles, 1 Dev. & Bat. 29; Thompson v. M'Kean, 1 Ashmead, 129; Hood v. Fahnestock, 8 Watts, 489; Mateer v. Hissim, 3 Penna. 160; Ewing v. Cargill, 21 Miss. 79; Blake v. Williams, 36 N. H. 39; Paige v. O'Neal, 12 Cal. 483; Green v. Tanner, 49 Mass. 411; Sutton v. Lord, 1 Dane. Ab. 631; Goodale v. Nichols, 1 Dane. Ab. 631; Gordon v. Haywood, 2 N. H. 402; Hawkins v. Sneed, 3 Hawks, 149; Hoy v. Wright, Brayt. 208; Neal v. Williams, 18 Me. 391; Trott v. Warren, 11 Me. 227; Erskine v. Decker, 39 Me. 467; Bean v. Smith, 2 Mason, 252; Jackson v. Terry, 13 Johns. 471; Lee v. Abbe, 2 Root, 359; Coleman v. Cocke, 6 Rand. 618; King v. Trice, 3 Ired. Eq. 568; Cummings v. McCullough, 5 Ala. 324; Sheldon v. Stryker, 42 Barb. 284; s. c. 27 How. Pr. 387; Wineland v. Coonce, 5 Mo. 296; Pine v. Rikert, 21 Barb. 469; Simpson v. Simpson, 7 Humph. 275; Choteau v. Jones, 11 Ill. 301; Comm. v. Richardson, 8 B. Mon. 81; Richards v. Ewing, 11 Humph. 327; Colquitt v. Thomas, 8 Geo. 258; Sinclair v. Healy, 40 Penn. 417; Curtis v. Riddle, 89 Mass. 185; Rankin v. Arndt, 44 Barb. 251; Parker v. Crittenden, 37 Conn. 148; Danbury v. Robinson, 14 N. J. Eq. 213; Friedenwald v. Mullan, 10 Heisk. 226; St. Louis M. L. Co. v. Cravens, 69 Mo. 72; Fury v. Kempin, 9 Mo. Ap. 30. *Contra*, Preston v. Crofut, 1 Conn. 527, note; Read v. Staton, 3 Hay. (Tenn.) 159.

[3] Thompson v. Lee, 3 W. & S. 479.

MUST BE BONA FIDE AND FOR VALUABLE CONSIDERATION.—An inquiry in regard to the rights of a purchaser only becomes material when he purchases for a valuable consideration without notice of the fraud. If he does not give a valuable consideration,[1] or if he has notice of the fraud,[2] he is in the same position towards the creditors as the fraudulent grantee, for he is, in the contemplation of the law, a participant in the fraud. If he takes a transfer in payment of a pre-existing debt due from the grantee, he is not entitled to protection against the creditors, for the avoidance of the conveyance places him in no worse situation than he was before, and the creditors have the stronger equity.[3] An extension of the time for the payment of a pre-existing debt is, however, a valuable consideration.[4] The relinquishment of a security is a good consideration.[5] The transaction between the fraudulent grantee and the purchaser must be completely closed by the payment of all the purchase money and the completion of the transfer before the notice, or the purchaser can not hold the property.[6] Notice before the payment of the

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[1] Forrest v. Camp, 16 Ala. 642.

[2] Parkman v. Welch, 36 Mass. 231; Wise v. Tripp, 13 Me. 9; Garland v. Rives, 4 Rand. 282; Knox v. Hunt, 18 Mo. 174; O'Connor v. Bernard, 2 Jones, 654; Dockray v. Mason, 48 Me. 178; Wade v. Saunders, 70 N. C. 270; Sedgwick v. Place, 10 N. B. R. 28; Harrell v. Beall, 9 N. B. R. 49; Brow v. Houser, 61 Geo. 629; Goshorn v. Snodgrass, 17 W. Va. 717.

[3] Manhattan Co. v. Evertson, 6 Paige, 457; Agricultural Bank v. Dorsey, 1 Freem. Ch. 338; Jessup v. Hulse, 29 Barb. 539; s. c. 21 N. Y. 168; Fleming v. Grafton, 54 Miss. 79; De Witt v. Van Sickle, 29 N. J. Eq. 209; Prout v. Vaughn, 52 Vt. 451. *Contra*, Knox v. Hunt, 18 Mo. 174; Thornton v. Hook, 36 Cal. 223; Okie v. Kelly, 12 Penn. 323.

[4] Thames v. Rembert, 63 Ala. 561.

[5] Agricultural Bank v. Dorsey, 1 Freem. Ch. 338.

[6] Dugan v. Vattier, 3 Blackf. 245; Colquitt v. Thomas, 8 Geo. 258; Rhodes v. Green, 36 Ind. 7.

purchase money,[1] or the completion of the transfer,[2] is sufficient to invalidate the transaction. Merely giving security for the purchase money is not enough to entitle a party to the character of a purchaser for a valuable consideration.[3]

WHAT NOTICE SUFFICIENT.—The notice of the fraud need only be sufficient to put a man of ordinary prudence and experience in business transactions upon the inquiry.[4] It is sufficient if the information is so definite as to enable the purchaser to ascertain whether it is authentic, and sufficiently clear and authentic to put the purchaser on inquiry, and to enable him to conduct that inquiry to the ascertainment of the fact. It is not necessary that the notice should be in the shape of a formal communication. Whatever is sufficient to direct his attention to the prior rights and equities of creditors and to enable him to ascertain their nature by inquiry will operate as notice.[5] When a purchaser has knowledge of any fact sufficient to put him on inquiry, he is presumed either to have made the inquiry and ascertained the extent of the rights that he may possibly prejudice, or to have been guilty of a degree of negligence fatal to the claim to be considered a *bona fide* purchaser.[6] This notice may be derived from

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[1] Dixon v. Hill, 5 Mich. 404; Marsh v. Armstrong, 20 Minn. 81; *vide* Newlin v. Osborne, 6 Jones (N. C.) 128; Phelps v. Morrison, 25 N. J. Eq. 538.

[2] Farnsworth v. Bell, 5 Sneed, 531; Jones v. Read, 3 Dana, 540.

[3] Rogers v. Hall, 4 Watts, 359.

[4] Ringgold v. Waggoner, 14 Ark. 69; Johnston v. Harvey, 2 Penna. 82; Baker v. Bliss, 39 N. Y. 70; Harrell v. Beal, 9 N. B. R. 49; Brow v. Houser, 61 Geo. 629; Stearns v. Gage, 79 N. Y. 102.

[5] Martel v. Somers, 26 Tex. 551.

[6] Baker v. Bliss, 39 N. Y. 70; *vide* Carroll v. Hayward, 124 Mass. 120.

the statement of creditors or other parties.[1] The debtor's retention of the possession of land,[2] or personal property,[3] is not a sufficient notice of any fraud in the transaction. The purchaser is chargeable with notice of all the matters which appear to be within the knowledge and memory of his agent.[4]

Apparent on Face of the Instrument.—The law sanctions a conveyance founded upon the consideration of blood or of marriage merely. The legal presumption therefore is that such a conveyance is valid and not a fraud upon the rights of any one. The mere fact that a purchaser from the holder of such a title has notice that it was not founded upon a pecuniary consideration is not sufficient to make it his duty at his peril to inquire whether the title of his grantor was not fraudulent. On the contrary, he has a right to act upon the legal presumption that such a deed of gift or voluntary settlement was honestly made until some other fact is brought to his knowledge to raise a suspicion in his mind that the conveyance is fraudulent.[5] He is, however, bound to take notice of any fraud apparent upon the face of a deed under which he claims title.[6]

Purchaser of Chattel Mortgage.—There is a distinction between real and personal estate. The title to

[1] Martel v. Somers, 26 Tex. 551. [2] Suiter v. Turner, 10 Iowa, 517.

[3] Danzey v. Smith, 4 Tex. 411; Boyle v. Rankin, 22 Penn. 168.

[4] Hook v. Mowre, 17 Iowa, 195; *vide* Hood v. Fahnestock, 8 Watts, 489.

[5] Frazer v. Western, 1 Barb. Ch. 220; s. c. 1 How. App. Cas. 448; Sparrow v. Chesley, 19 Me. 79; Gabler v. Boyd, 22 Pitts. L. J. 89.

[6] Farmers' Bank v. Douglass, 19 Miss. 469; Johnson v. Thweatt, 18 Ala. 741; Spencer v. Godwin, 30 Ala. 355; Palmer v. Giles, 5 Jones Eq. 75; Ward v. Trotter, 3 Mon. 1; Johnston v. Harvey, 2 Penna. 82.

real property can only be transferred by deed, but no deed or writing is made by law essential to the transfer of title to personal property. A purchaser must take it upon his vendor's warranty of title. A purchaser who takes an assignment of a fraudulent chattel mortgage after the assignee in bankruptcy or insolvency has taken possession of the property under an absolute claim of right, and converted it to his own use, will not be deemed a *bona fide* purchaser, even though he had no notice of the fraud.[1]

SUBSEQUENT JUDGMENT.—In the case of a fraudulent transfer of land, a subsequent judgment against the grantor is not constructive notice to a purchaser from the grantee, for upon searching the records and finding the transfer, the person who is about to purchase is not bound to go further and search the records for the purpose of ascertaining whether subsequent jndgments may not have been recovered against the debtor.[2] Therefore if he buys the land from the grantee in good faith and for a valuable consideration prior to a sale under an execution on the judgment, he will acquire a good title notwithstanding the judgment,[3] or even the issuing of an execution thereon,[4] for the *bona fides* and valuable consideration in the second purchase supply the want of these qualities in the first, so as to perfect the title of the *bona fide* purchaser by

[1] Bigelow v. Smith, 84 Mass. 264.

[2] Ledyard v. Butler, 9 Paige, 132; Jackson v. Terry, 13 Johns. 471; Scott v. Purcell, 7 Blackf. 66.

[3] Anderson v. Roberts, 18 Johns. 515; s. c. 2 Johns. Ch. 372; Scott v. Purcell, 7 Blackf. 66; Wood v. Wright, 4 Fed. Rep. 511; Murray v. Jones, 50 Geo. 109; Beall v. Harrell, 7 N. B. R. 400; s. c. 1 Woods, 476.

[4] Young v. Lathrop, 67 N. C. 63; Williams v. Lowe, 4 Humph. 62; Thames v. Rembert, 63 Ala. 561. *Contra*, McCabe v. Snyder, 3 Phila. 192.

carrying it back to the debtor and thus divest any lien that may have attached in the interval. If a party, however, purchases after the levying of an execution[1] or an attachment,[2] or during the pendency of a bill in equity to set aside the conveyance,[3] he is a purchaser *pendente lite*, and his rights are subordinate to those of the creditors. A party who purchases at a sale under an execution has the prior right as against a party who subsequently buys the property from the grantee, although the latter has no notice of the prior sheriff's sale.[4] His right to priority is not affected by the fact that his deed is not executed until after the execution of the deed from the fraudulent grantee, for his deed relates back to the day of the sale.[5] The rights of the respective purchasers are liable, however, to be affected by the laws relating to the registration of deeds. If a purchaser at a sale under an execution records his deed prior to a purchase from the grantee, he has the prior right.[6] But his deed will be postponed to a subsequent deed from the grantee if that is recorded first, although his deed is prior in point of time, for the priority of conveyances as between purchasers deriving title under the fraudulent grantor and fraudulent grantee respectively depends upon the time of recording the conveyances.[7] It has, however, been held that a sale under an execution of property fraudulently purchased in the

[1] Brown v. Niles, 16 Ill. 385; Tomlin v. Crawford, 61 Geo. 128.

[2] Tuttle v. Turner, 28 Tex. 759.

[3] Jackson v. Andrews, 7 Wend. 152; Collumb v. Read, 24 N. Y. 505.

[4] McCreery v. Pursley, 1 A. K. Marsh, 114; Reed v. Smith, 14 Ala. 380; Read v. Staton, 3 Heyw. (Tenn.) 159; Hoke v. Henderson, 3 Dev. 12; Baxter v. Sewell, 3 Md. 334; s. c. 2 Md. Ch. 447.

[5] Hoke v. Henderson, 3 Dev. 12.

[6] Reed v. Smith, 14 Ala. 380; Baxter v. Sewell, 3 Md. 334; s. c. 2 Md. Ch. 447; Orendorf v. Budlong, 12 Fed. Rep. 24.

[7] Ledyard v. Butler, 9 Paige, 132; Jackson v. Terry, 13 Johns. 471.

name of another, and a record of the sheriff's deed, would not prevail against a subsequent *bona fide* purchaser from the grantee, on the ground that the registry of a deed is only evidence of a notice to subsequent purchasers under the same grantor.[1] If property is fraudulently purchased in the name of another, a party who buys from the grantee has a valid title as against the creditors, although his deed is not recorded at the time of the filing of a bill to set aside the conveyance.[2] When the commencement of such a proceeding creates a *lis pendens*, a party who buys the property at a sale under the same has the prior right as against a mortgage which was executed before, but not recorded until after, the commencement of the proceeding.[3]

MARRIAGE.—If the property fraudulently conveyed has been any inducement to a marriage, the marriage constitutes a valuable consideration, and the husband and wife are considered as purchasers.[4] The marriage, however, must take place before there is a lien upon the property.[5]

WHEN PURCHASERS PROTECTED.—If the purchase is in good faith and for a valuable consideration, it is immaterial whether the conveyance is a quit claim deed or a deed with full covenants of warranty.[6] A *bona fide* pur-

[1] Crockett v. Maguire, 10 Mo. 34. [2] Coleman v. Cocke, 6 Rand. 618.

[3] Ayrault v. Murphy, 54 N. Y. 203.

[4] Wood v. Jackson, 8 Wend. 9; Bentley v. Harris, 2 Gratt. 357; Huston v. Cantril, 11 Leigh, 136; East India Co. v. Clavell, Gilb. 37; s. c. Prec. Ch. 377; s. c. 28 L. J. Ch. 719; George v. Milbanke, 9 Ves. 189; Martyn v. McNamara, 4 Dr. & War. 411; Hopkirk v. Randolph, 2 Brock. 132; *vide* Stokes v. Jones, 18 Ala. 734; s. c. 21 Ala. 731; Miller v. Thompson, 3 Port. 196; O'Brien v. Coulter, 2 Blackf. 421.

[5] Fones v. Rice, 9 Gratt. 568.

[6] Mansfield v. Dyer, 131 Mass. 200.

chaser at a sale under an execution obtains a good title although the judgment is fraudulent.[1] A mortgagee is within the protection of the proviso, for a mortgagee is a purchaser to the extent of his interest within the meaning of the statute.[2] A *bona fide* purchaser of a fraudulent mortgage obtains a valid title as against creditors.[3] If a *bona fide* purchaser sells the property to the fraudulent grantee and takes a mortgage to secure the purchase money, he is within the protection of the proviso to the extent of his mortgage.[4] A purchaser with notice of the fraud will get a good title when no debts contracted prior to his purchase remain unpaid.[5] A purchaser without notice of the fraud may sell the property to a person who has notice, for the law does not know of an unencumbered estate which is forfeited by alienation, or for which the owner can not pass a good title to a purchaser.[6]

TRANSFER TO CREDITOR.—Until there is a lien or seizure by virtue of some legal proceeding, the grantee can do all that the debtor could have done had he retained the property. He may therefore sell or mortgage it to the creditors of the grantor. As between the debtor and the grantee, the power of the grantee to convey needs no

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[1] Griffin v. Wardlaw, Harp. Ch. 481; Imray v. Magnay, 11 M. & W. 267.

[2] Ledyard v. Butler, 9 Paige, 132; Brooks v. D'Orville, 7 Ben. 485; Sedgwick v. Place, 12 Blatch. 163; s. c. 10 N. B. R. 28; Farmers' Nat'l Bank v. Teeter, 31 Ohio St. 36; Moore v. Sexton, 30 Gratt. 505; Stone v. Bartlett, 46 Me. 438; Reynolds v. Park, 5 Lans. 149.

[3] Sleeper v. Chapman, 121 Mass. 404; Logan v. Brick, 2 Del. Ch. 206; Smart v. Bement, 4 Abb. Ap. 253. *Contra*, Fleming v. Grafton, 54 Miss. 79; Judge v. Vogel, 38 Mich. 569. [4] Spicer v. Robinson, 73 Ill. 519.

[5] Toole v. Darden, 6 Ired. Eq. 394.

[6] Mateer v. Hissim, 3 Penna. 160; Wilson v. Ayre, 7 Me. 207; Evans v. Nealis, 69 Ind. 148; Stewart v. Reed, 91 Penn. 287.

recognition or addition whatever, and his right to do so in favor of a creditor is as between the parties to the transaction unquestionable. The assent of the debtor is not of the slightest value so far as power is concerned. By the transfer the debtor assents in fact to whatever the grantee may choose to do with the property, and he effectually assents in law to whatever the grantee may honestly do with it.[1] Whenever the grantee does that which the law would compel him to do, there is no reason for disturbing his act, and therefore if he applies it to pay the demand of a creditor, the transfer will be good to that extent, because the property receives the same direction and application which the law would give it upon declaring the transfer void. The creditor moreover will receive a good title although he has full knowledge of the fraud.[2] The creditor, however, must act in good faith.[3] If he takes an absolute deed and pays the grantee the difference between the amount of his debt and the value of the property, he will not obtain a good title unless the sum so paid is so small that the desire to obtain satisfaction of his claim constitutes the real inducement to the transaction.[4] The transfer to the creditor must moreover be made in the consummation of an honest and laudable purpose on the part of the grantee. If it is made not for the purpose of payment or security, but in consideration of an assignment of the debt to him, it does not come under the protection

[1] Webb v. Brown, 3 Ohio St. 246.

[2] Boyd v. Brown, 34 Mass. 453; Webb v. Brown, 3 Ohio St. 246; Stark v. Ward, 3 Penn. 328; Agricultural Bank v. Dorsey, 1 Freem. Ch. 338; Butler v. White, 25 Minn. 432; Murphy v. Moore, 30 N. Y. Supr. 95; *vide* Waggoner v. Cooley, 17 Ill. 239; Jewett v. Cook, 81 Ill. 260.

[3] Copenheaver v. Huffacker, 6 B. Mon. 18; Brown v. Webb, 20 Ohio, 389.

[4] Baker v. Bliss, 39 N. Y. 70.

of the principle that permits a creditor to obtain payment out of the property in whosesoever hands it may be.[1] If the debtor takes a mortgage on the property as a part of the fraud, and then assigns it to a creditor in satisfaction of a pre-existing debt, the latter will not be a *bona fide* holder for a valuable consideration.[2]

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[1] Waggoner v. Cooley, 17 Ill. 239.

[2] De Witt v. Van Sickle, 29 N. J. Eq. 209; National Bank v. Sprague, 21 N. J. Eq. 530; Johnston v. Dick, 27 Miss. 277; *vide* Davis v. Gibbon, 24 Iowa, 257.

CHAPTER XVIII.

WHO ARE CREDITORS.

CLAIM MUST BE CAPABLE OF ENFORCEMENT.—The statute by express terms makes a fraudulent transfer void as against creditors and others who have just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries or reliefs. The sole object of the statute is to protect lawful debts, claims or demands, and not those which are unlawful or pretended and which have no foundation in law or justice. A claim which is merely pretended,[1] or is founded upon an illegal consideration,[2] or which can not for any other reason be enforced,[3] is not therefore within its protection. The law, however, does not permit a debtor to determine whether a claim is just or unjust. That question is one which must be settled by the judicial tribunal alone. It will not do to allow a man's preponderating self-interest to decide which of his debts are just and which unjust, for under such a rule he might decide his debts to be unjust when he could no longer procrastinate payment.[4]

LIBERAL CONSTRUCTION.—The statute by the words "creditors and others" embraces others than those who

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[1] Baker v. Gilman, 52 Barb. 26; Townsend v. Tuttle, 28 N. J. Eq. 449.

[2] Alexander v. Gould, 1 Mass. 165; Fuller v. Bean, 30 N. H. 181; Hanson v. Power, 8 Dana, 91; Bruggerman v. Hoerr, 7 Minn. 337.

[3] Hart v. Hart, 5 Watts, 106; Edwards v. M'Gee, 31 Miss. 143.

[4] Brady v. Briscoe, 2 J. J. Marsh. 212; Hook v. Mowre, 17 Iowa, 195; Harris v. Harris, 23 Gratt. 737.

are strictly and technically creditors.[1] Even the word "creditor" does not receive a strict definition, for a party who is not strictly speaking a creditor may stand in the equity of a creditor and have an interest that may be defrauded.[2] The statute protects all just and lawful actions, suits, debts, accounts, damages, penalties and forfeitures, and consequently all persons having such interests must be included in the phrase "creditors and others."[3] It extends to every person having a legal demand against another, whether the demand is one sounding in damages or arises under a contract.[4]

CHARACTER IMMATERIAL.—The character of the claim, if it is just and lawful, is immaterial. It need not be due, for although the holder can not maintain an action until it is due, he nevertheless has an interest in the property as a fund out of which the demand ought to be paid.[5] The claim of a partner against his co-partner for his share in the capital of the partnership is as fully protected as the claims of the creditors against the partnership.[6] The liability of a surviving partner to account for the partnership property is a fixed present liability, and is within the protection of the statute.[7] A contingent claim is as fully protected as one that is absolute.[8] A liability as surety is

[1] Feigley v. Feigley, 7 Md. 537; Shontz v. Brown, 27 Penn. 123.

[2] Shontz v. Brown, 27 Penn. 123; Hutchinson v. Kelly, 1 Rob. 123; Walradt v. Brown, 1 Gilman, 397.

[3] Twyne's Case, 3 Co. 80; s. c. Moore, 638; Walradt v. Brown, 1 Gilman, 397; Alston v. Rowles, 13 Fla. 117.

[4] Harris v. Harris, 23 Gratt. 737.

[5] Howe v. Ward, 4 Me. 195; Cook v. Johnson, 12 N. J. Eq. 51; Mott v. Danforth, 6 Watts, 304.

[6] White v. Russell, 49 Ill. 155; Swan v. Smith, 57 Miss. 548.

[7] Alston v. Rowles, 13 Fla. 117.

[8] Seward v. Jackson, 8 Cow. 406; s. c. 5 Cow. 67; Van Wyck v. Seward, 18 Wend. 365; s. c. 6 Paige, 62; s. c. 1 Edw. 327; Shontz v. Brown, 27 Penn. 123; McLaughlin v. Bank of Potomac, 7 How. 220;

within the statute as much as a liability as principal.[1] The statute embraces all pecuniary damages incurred by reason of the obligation of a contract, whether of an ascertained amount or only sounding in damages, and whether actually asserted or only demandable.[2] It extends to a liability arising from the embezzlement of property entrusted to a party who sells it and appropriates the proceeds to his own use.[3] It includes voluntary bonds,[4] claims for taxes,[5] and claims which are payable after the decease of the debtor.[6] Its protection extends to an action for slander,[7] or a tort,[8] a breach of a promise to marry,[9] the

Woodley v. Abby, 5 Call. 336; Gannard v. Eslava, 20 Ala. 732; Bay v. Cook, 31 Ill. 336; Cook v. Johnson, 12 N. J. Eq. 51; Manhattan Co. v. Osgood, 15 Johns. 162; s. c. 3 Cow. 612; Bibb v. Freeman, 59 Ala. 512; Fearn v. Ward, 65 Ala. 33.

[1] Russell v. Stinson, 3 Heyw. 1; Carl v. Smith, 28 Leg. Int. 366; Crane v. Stickles, 15 Vt. 253; Hutchinson v. Kelly, 1 Rob. 123; Curd v. Lewis, 7 Gratt. 185; Gibson v. Love, 4 Fla. 217; Bay v. Cook, 31 Ill. 336.

[2] Hutchinson v. Kelly, 1 Rob. 123.

[3] Pendleton v. Hughes, 65 Barb. 136.

[4] Adames v. Hallett, L. R. 6 Eq. 468; Hanson v. Buckner, 4 Dana, 251.

[5] Stimson v. Wrigley, 86 N. Y. 332.

[6] Adames v. Hallett, L. R. 6 Eq. 468; Rider v. Kidder, 10 Ves. 360; s. c. 12 Ves. 202; 13 Ves. 123; *vide* Henderson v. Dodd, 1 Bailey Ch. 138.

[7] Jackson v. Myers, 18 Johns. 425; Lillard v. McGee, 4 Bibb. 165; Hord v. Rust, 4 Bibb. 231; Fowler v. Frisbie, 3 Conn. 320; Walradt v. Brown, 1 Gilman, 397; Hall v. Sands, 52 Me. 355; Langford v. Fly, 7 Humph. 585; Johnson v. Brandis, 1 Smith, 263; Wright v. Brandis, 1 Ind. 336; Farnsworth v. Bell, 5 Sneed, 531; Rogers v. Evans, 3 Ind. 574; Shean v. Shay, 42 Ind. 375; Cooke v. Cooke, 43 Md. 522.

[8] Jackson v. Mather, 7 Cow. 301; Paul v. Crooker, 8 N. H. 288; McLean v. Morgan, 3 B. Mon. 282; Lewkner v. Freeman, 1 Eq. Cas. Abr. 149; s. c. 2 Freem. 236; s. c. Prec. Ch. 105; M'Erwin v. Benning, 1 Hawks, 474; Fox v. Hills, 1 Conn. 295; Greer v. Wright, 6 Gratt. 154; Wilcox v. Fitch, 20 Johns. 472; Foote v. Cobb, 18 Ala. 585; Patrick v. Ford, 5 Sneed, 532, note; Vance v. Smith, 2 Heisk. 343; Barling v. Bishopp, 29 Beav. 417; Corder v. Williams, 40 Iowa, 582; Scott v. Hartman, 26 N. J. Eq. 89; Martin v. Walker, 19 N. Y. Supr. 46; Bongard v. Block, 81 Ill. 186; Westmoreland v. Powell, 59 Geo. 256.

[9] Lowry v. Pinson, 2 Bailey, 324; Smith v. Culbertson, 9 Rich. 106; Hoffman v. Junk, 51 Wis. 613.

support of a bastard child,[1] a false representation,[2] a demand or forfeiture due to the State for offenses,[3] and a claim for usurious interest.[4]

Feme Covert and Others.—The claim of a *feme covert* against her husband under a marriage settlement,[5] or in proceedings instituted to obtain a divorce and alimony,[6] is within the statute. A stockholder is not allowed to transfer his property so as to defeat a liability imposed upon him by statute for the debts of the corporation.[7] An heir can not fraudulently alien assets which have descended for the purpose of defeating his liability for the debts of his ancestor.[8] A transfer for the purpose of defeating a sequestration,[9] or an attachment,[10] is as fraudulent as a

[1] Damon v. Bryant, 19 Mass. 411.

[2] Miner v. Warner, 2 Grant, 448; s. c. 2 Phila. 124.

[3] Rex v. Nottingham, Lane, 42; State v. Fife, 2 Bailey, 337; Jones v. Ashurst, Skin. 357; Morewood v. Wilkes, 6 C. & P. 144; Shaw v. Bran, 1 Stark. 319; Sanders v. Warton, 32 L. J. Ch. 224; s. c. 1 N. B. R. 256; Perkins v. Bradley, 1 Hare, 219; s. c. 6 Jur. 254.

[4] Heath v. Page, 63 Penn. 280.

[5] Rider v. Kidder, 10 Ves. 360; s. c. 12 Ves. 202; 13 Ves. 123.

[6] Feigley v. Feigley, 7 Md. 537; Blenkinsopp v. Blenkinsopp, 1 De G. M. & G. 495; s. c. 12 Beav. 568; s. c. 21 L. J. Ch. 404; Taylor v. Wyld, 8 Beav. 159; Claggett v. Gibson, 3 Cranch C. C. 359; Boils v. Boils, 1 Cold. 284; Brooks v. Caughran, 3 Head, 464; Ruffing v. Tilton, 12 Ind. 259; Livermore v. Boutelle, 77 Mass. 217; Turner v. Turner, 44 Ala. 437; Morrison v. Morrison, 49 N. H. 69; Frakes v. Brown, 2 Blackf. 295; Chase v. Chase, 105 Mass. 385; Boughslough v. Boughslough, 68 Penn. 495; Kamp v. Kamp, 46 How. Pr. 143; Draper v. Draper, 68 Ill. 17; Bailey v. Bailey, 61 Me. 361; Nix v. Nix, 10 Heisk. 546; Dugan v. Frisler, 69 Ind. 553.

[7] Marcy v. Clark, 17 Mass. 330.

[8] Gooch's Case, 5 Co. 60; Leonard v. Bacon, Cro. Eliz. 234; Apharry v. Bodingham, Cro. Eliz. 350; Richardson v. Horton, 7 Beav. 112; Hetfield v. Jacques, 10 N. J. 259.

[9] Hamblyn v. Ley, 3 Swanst. 301, n.; Coulston v. Gardiner, 3 Swanst. 279; Empringham v. Short, 3 Hare, 461.

[10] Pendleton & Gunston's Case, 1 Leon, 47; Getzler v. Saroni, 18 Ill. 511; Dixon v. Hill, 5 Mich. 404; Rinchey v. Stryker, 26 How. Pr. 75;

transfer to defeat an execution. The responsibility for the acts of a partner,[1] or of the principal to whom an accommodation indorser lends his name,[2] is a risk which the party who enters into such a contract assumes and has no right to evade. The word "forfeiture" in the statute is intended not only of a forfeiture of an obligation, recognizance, or such like, but to everything which shall by law be forfeit to the king or subject. Therefore if a man, to prevent a forfeiture for felony or by outlawry, makes a conveyance of all his goods and afterwards is attainted or outlawed, the goods are forfeited notwithstanding the conveyance.[3]

RIGHT NOT PERSONAL.—A creditor can not treat a transfer as void except as to his demand. If that is paid, he is not deemed to be a creditor as to a subsequent debt.[4] The right however is not merely personal. If a creditor transfers his claim, he can not impeach it any longer on the ground of fraud. But as to the demand or any suit thereon, until paid or discharged, such a transfer is utterly void. Whoever may become the owner of the debt can enforce it against the property.[5] The transfer is void not only against creditors, but against those who represent creditors. It is void as against sheriffs,[6] purchasers at a

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Van Kirk v. Wilds, 11 Barb. 520; Thayer v. Willett, 9 Abb. Pr. 325; s. c. 5 Bosw. 344; Swanzey v. Hunt, 2 N. & M. 211. *Contra*, Hall v. Stryker, 9 Abb. Pr. 342; s. c. 29 Barb. 105; Bentley v. Goodwin, 15 Abb. Pr. 82.

[1] Thomson v. Dougherty, 12 S. & R. 448.

[2] Cook v. Johnson, 12 N. J. Eq. 51.

[3] Twyne's Case, 3 Co. 80; s. c. Moore, 638.

[4] Robbins v. Sackett, 23 Kans. 301.

[5] Warren v. Williams, 52 Me. 343; Cook v. Ligon, 54 Miss. 652.

[6] Turvil v. Tupper, Latch. 222; Schlussel v. Willett, 32 Barb. 615; s. c. 12 Abb. Pr. 397; s. c. 22 How. Pr. 15; Hozey v. Buchanan, 16 Pet. 215; Clute v. Fitch, 25 Barb. 428; Pierce v. Jackson, 6 Mass. 242; Imray v. Magnay, 11 M. & W. 267; Scarfe v. Halifax, 7 M. & W. 288.

sale under an execution,[1] assignees in bankruptcy,[2] and receivers appointed in proceedings supplemental to an execution.[3]

At what Time Accrues.—The distinction between prior and subsequent creditors makes it important at times to inquire into the date and origin of a demand. It may be laid down as a general rule that all claims which arise from contract are in force from the date of the agreement. The liability dates from that time, although no demand accrues until a subsequent date.[4] A covenant with a general warranty,[5] a bond of conveyance,[6] and the

[1] Cole v. White, 16 Wend. 511; s. c. 24 Wend. 116; Barr v. Hatch, 3 Ohio, 527; King v. Bailey, 6 Mo. 575.

[2] Badger v. Story, 16 N. H. 168; Anderson v. Maltbie, 2 Ves. Jr. 244; Carr v. Hilton, 1 Curt. 230, 390; Ward v. Van Bokkelen, 2 Paige, 289; Giraud v. Mazier, 13 La. An. 147; Nouvet v. Bollinger, 15 La. An. 293; Shackleford v. Collier, 6 Bush, 149; Grimsby v. Ball, 11 M. & W. 531; Pott v. Todhunter, 2 Coll. 76; Butcher v. Harrison, 4 B. & A. 129; Jamison v. Chestnut, 8 Md. 34; Bradshaw v. Klein, 1 N. B. R. 542; s. c. 2 Biss. 20; *in re* Myers, 1 N. B. R. 581; s. c. 2 Ben. 424; *in re* Metzger, 2 N. B. R. 355; Tams v. Bullitt, 35 Penn. 308. *Contra*, Reavis v. Garner, 12 Ala. 661; Waters v. Dashiell, 1 Md. 455; Robinson v. McDonnell, 2 B. & Ald. 134.

[3] Bostwick v. Beizer, 10 Abb. Pr. 197; Porter v. Williams, 9 N. Y. 142; s. c. 12 How. Pr. 107. *Contra*, Seymour v. Wilson, 16 Barb. 294; s. c. 14 N. Y. 567; 19 N. Y. 417; Hayner v. Fowler, 16 Barb. 300.

[4] Seward v. Jackson, 8 Cow. 406; s. c. 5 Cow. 67; Van Wyck v. Seward, 18 Wend. 375; s. c. 6 Paige, 62; s. c. 1 Edw. 327; Gannard v. Eslava, 20 Ala. 732; Black v. Cadwell, 4 Jones (N. C.) 150; Stone v. Myers, 9 Minn. 303; White v. Sansom, 3 Atk. 410; East India Co. v. Clavell, Gilb. 37; s. c. Prec. Ch. 377; s. c. 28 L. J. Ch. 719; Richardson v. Smallwood, Jac. 552; s. c. 1 Cond. Ch. 262; Mountford v. Ranie, 2 Keble, 499; Wooldridge v. Gage, 68 Ill. 157; Mattingly v. Wulke, 2 Bradw. 169; *vide* Fales v. Thompson, 1 Mass. 134; Bridgford v. Riddell, 55 Ill. 261; U. S. v. Steiner, 8 Blatch. 544.

[5] Gannard v. Eslava, 20 Ala. 732; Seward v. Jackson, 8 Cow. 406; s. c. 5 Cow. 67; Van Wyck v. Seward, 18 Wend. 375; s. c. 6 Paige, 62; s. c. 1 Edw. 327; Rhodes v. Green, 36 Ind. 7; *vide* Bridgford v. Riddell, 55 Ill. 261.

[6] Stone v. Myers, 9 Minn. 303.

bond of an administrator,[1] take effect from the date of the instrument. A surety is subrogated to all the rights of the creditor whose claim he has paid.[2] An endorser has the same rights as the holder of a note.[3] The claim of a surety against either the principal,[4] or his co-surety,[5] is referred to the date of the execution of the obligation. But a surety upon an appeal bond who is compelled to pay the judgment is entitled to all the rights of the judgment creditor.[6] The claim of a principal against his agent arises as soon as the agent receives the money or property of the principal.[7] The liability of a surviving partner dates from the death of the co-partner and the assumption of the effects of the firm by him.[8] A demand arising from a tort is in force from the time of the commission of the wrong.[9] A trustee becomes a debtor as soon as he receives the trust fund.[10] The claim of a residuary legatee

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[1] Anderson v. Anderson, 64 Ala. 403.

[2] Cato v. Easley, 2 Stew. 214; Sargent v. Salmond, 27 Me. 539; Choteau v. Jones, 11 Ill. 301; Greene v. Starnes, 1 Heisk. 582; Hurdt v. Courtenay, 4 Met. (Ky.) 139; Taylor v. Heriot, 4 Dessau. 227; Huston v. Cantrill, 11 Leigh, 136; Swindersine v. Miscally, 1 Bailey Ch. 304; Heighe v. Farmers' Bank, 5 H. & J. 68; Highland v. Highland, 5 W. Va. 63.

[3] Cramer v. Reford, 17 N. J. Eq. 367; Primrose v. Browning, 56 Geo. 369.

[4] Thompson v. Thompson, 19 Me. 244; Carlisle v. Rich, 8 N. H. 44; Hatfield v. Mercer, 82 Ill. 113.

[5] Howe v. Ward, 4 Me. 195; Sargent v. Salmond, 27 Me. 539; Raymond v. Cook, 31 Tex. 373; Crawford v. Kirksey, 50 Ala. 591; Smith v. Rumsey, 33 Mich. 183. [6] Martin v. Walker, 19 N. Y. Supr. 46.

[7] Young v. Heermans, 66 N. Y. 374.

[8] Alston v. Rowles, 13 Fla. 117.

[9] Walradt v. Brown, 1 Gilman, 397; Langford v. Fly, 7 Humph. 585; Farnsworth v. Bell, 5 Sneed, 531; Miller v. Dayton, 47 Iowa, 312; *vide* Meserve v. Dyer, 4 Me. 52; Slater v. Sherman, 5 Bush, 206; Fowler v. Frisbie, 3 Conn. 320; Ford v. Johnston, 14 N. Y. Supr. 563; Evans v. Lewis, 30 Ohio St. 11. [10] McLemore v. Nuckolls, 37 Ala. 662.

against an executor who holds the money to be paid upon the death of another, dates from the time when the money was received by the executor.[1] An accommodation note dated anterior to the transfer, though discounted subsequently, is regarded as a prior claim.[2] A judgment for costs takes effect only from the rendition of the judgment.[3] A judgment for a prior and subsequent demand is a subsequent debt, for it can not be apportioned.[4] A town to which the grantor applies for support has not such a fixed, definite and certain legal claim that it can impeach a transfer made before the application.[5]

Evidence to Antedate.—A judgment is *prima facie* a claim only from the institution of the suit.[6] The legal presumption is that a note is executed by the maker at the date upon its face,[7] and that an indorsement was made before the maturity of the note.[8] In the absence of proof, the origin of a debt is referred to the date of the note.[9] The rights of a creditor, however, arise from the fact that a debt is due. Any change, therefore, of the evidence of the existence of the debt does not exert any influence upon these rights. Evidence may be introduced to show that a

[1] Soden v. Soden, 34 N. J. Eq. 115.

[2] Williams v. Banks, 11 Md. 198; s. c. 19 Md. 22.

[3] Pelham v. Aldrich, 74 Mass. 515; Ogden v. Prentice, 33 Barb. 160.

[4] Baker v. Gilman, 52 Barb. 26; Reed v. Woodman, 4 Me. 400; Usher v. Hazeltine, 5 Me. 471; Miller v. Miller, 23 Me. 22; Moritz v. Hoffman, 35 Ill. 553; Quimby v. Dill, 40 Me. 528; French v. Holmes, 67 Me. 186. *Contra*, Ecker v. Lafferty, 20 Pitts. L. J. 135.

[5] Fairbanks v. Benjamin, 50 Vt. 99.

[6] Niller v. Johnson, 27 Md. 6; White v. Beltis, 9 Heisk. 645; Marshall v. Croom, 60 Ala. 121.

[7] Williams v. Banks, 11 Md. 198; s. c. 19 Md. 22; Emery v. Vinall, 26 Me. 295.

[8] McDowell v. Goldsmith, 6 Md. 319; s. c. 2 Md. Ch. 370; s. c. 24 Md. 214.

[9] Johnston v. Zane, 11 Gratt. 552.

judgment is founded upon a prior claim.[1] A note may be shown to be given for a prior account,[2] or in renewal of a prior note.[3] A novation does not affect the rights under the debt.[4] A renewal by which a liability is created different from that created by the original debt is a new debt.[5]

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[1] Hindes v. Longworth, 11 Wheat. 199; Harlan v. Barnes, 5 Dana, 219; Williams v. Jones, 2 Ala. 314; Chandler v. Van Roeder, 24 How. 224.

[2] Moore v. Spence, 6 Ala. 506; Blue v. Penniston, 27 Mo. 272; Cook v. Ligon, 54 Miss. 652; Stout v. Stout, 77 Ind. 537; *vidé* Bangor v. Warren, 34 Me. 324; Eigleberger v. Kibler, 1 Hill Ch. 113; Morsell v. Baden, 22 Md. 391.

[3] McLaughlin v. Bank of Potomac, 7 How. 220; Lowry v. Fisher, 2 Bush, 70; Lee v. Hollister, 5 Fed. Rep. 750.

[4] Gardner v. Baker, 25 Iowa, 343.

[5] Bank v. Marchand, 2 T. U. P. Charlt. 247.

CHAPTER XIX.

INTERNATIONAL LAW.

LEX LOCI.—The validity of an instrument conveying property is to be determined according to the laws of the place where it is made.[1] If it is invalid by those laws, it will not be valid anywhere.[2] Questions of evidence pertain to the remedy and are decided by the *lex fori*. Fraud may therefore be inferred from facts which would not be conclusive in the State where the instrument was executed.[3] A sale in an adjoining State to which the property has been removed for the purpose of evading an execution will not purify the fraud.[4]

LAND.—The title or disposition of real estate is exclusively subject to the laws of the country where the land is located, and a conveyance of it must conform to those laws.[5] The courts of one State have no jurisdiction or authority to set aside a fraudulent conveyance of land situate in another State.[6]

[1] Martin v. Hill, 12 Barb. 631; Fairbanks v. Bloomfield, 5 Duer, 434; Balto. & Ohio R. R. Co. v. Glenn, 28 Md. 287; French v. Hall, 9 N. H. 137; Livermore v. Jenckes, 21 How. 126; Barton v. Bolton, 3 Phila. 369.

[2] Fellows v. Commercial Bank, 6 Rob. (La.) 246; Graves v. Roy, 14 La. 454; Maberry v. Shisler, 1 Harring. 349.

[3] Barton v. Bolton, 3 Phila. 369. [4] Watts v. Kilburn, 7 Geo. 356.

[5] Osborn v. Adams, 35 Mass. 245; Bentley v. Whittemore, 18 N. J. Eq. 366; Lamb v. Fries, 2 Penn. 83; Evans v. Dunkelberger, 3 Grant, 134; Gardner v. Commercial Bank, 95 Ill. 298; First Nat'l Bank v. Hughes, 10 Mo. Ap. 7.

[6] Fetter v. Cirode, 4 B. Mon. 482; Nicholson v. Leavitt, 4 Sandf. 252; s. c. 6 N. Y. 510; s. c. 10 N. Y. 591; *vide* D'Ivernois v. Leavitt, 23 Barb. 63.

PERSONAL PROPERTY.—It is one of the maxims of international jurisprudence that personal property as a rule has no *situs*, but appertains to the person of the owner, and that, as a consequence, such owner can dispose of it by any instrument or in any method, and to such uses as are authorized by the law of the place where the conveyance is executed. The rule is not so much a convenience as it is a necessity of trade, one of those fundamental things without which traffic would be in all its parts impeded. If the law of the locality of personalty were to be taken as the criterion of the legality of its transfer, it is evident the transmission would often be attended with serious perplexity, for it would on most occasions be quite impracticable for the owner of the goods, or the creditor to whom the debt was due, to ascertain with sufficient exactness the diversified requirements of the local laws of the different countries through which such goods might pass, or in which the person of the debtor might at any moment happen to be. The principle that personal effects have no locality arises out of the necessities of trade. It is accordingly held almost universally that an assignment or transfer valid by the laws of the State where it is made will be upheld everywhere.[1] A debt has no *situs*

[1] Noble v. Smith, 6 R. I. 446; Moore v. Willett, 35 Barb. 663; Van Buskirk v. Warren, 39 N. Y. 119; s. c. 34 Barb. 457; s. c. 13 Abb. Pr. 145; s. c. 4 Abb. Ap. 457; Cage v. Wells, 7 Humph. 195; Fairbanks v. Bloomfield, 5 Duer, 434; Ackerman v. Cross, 40 Barb. 465; Richardson v. Leavitt, 1 La. An. 430; Caskie v. Webster, 2 Wall. Jr. 131; Law v. Mills, 18 Penn. 185; Speed v. May, 17 Penn. 91; Frazier v. Fredericks, 24 N. J. 162; Russell v. Tunno, 11 Rich. 303; Robinson v. Repeleye, 2 Stew. 86; U. S. v. Bank of U. S., 8 Rob. (La.) 262; Mowry v. Crocker, 6 Wis. 326; Newman v. Bagley, 33 Mass. 570; Bholen v. Cleaveland, 5 Mason, 174; U. S. Bank v. Huth, 4 B. Mon. 423; Atwood v. Protection Ins. Co., 14 Conn. 555; Hanford v. Paine, 32 Vt. 442; Walters v. Whitlock, 9 Fla. 86; Dundas v. Bowler, 3 McLean, 397; Houston v. Nowland,

and is deemed in contemplation of law to be attached to and to follow the person of the creditor.[1]

STATE STATUTES.—There is an exception to the rule that a conveyance of personalty valid in the State where it is made will be upheld everywhere. Every State or nation possesses the power to pass laws for the protection and security of its own citizens, and being looked to for the protection of property within its territorial limits, has the unquestionable right to adopt such regulations for its transfer as may be deemed necessary to protect and secure its own citizens from imposition and fraud. And if such regulations are adopted in conflict with the general rule, they will prevail.[2] But a construction should not be hastily given which would lead to a conflict if an interpretation can be fairly made to avoid it, or, in other words, there should be a clear and manifest repugnance between them to justify the courts to disregard the general rule which is respected and regarded by all civilized nations.

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7 G. & J. 480; Means v. Hapgood, 36 Mass. 105; Greene v. Mowry, 2 Bailey, 163; West v. Tupper, 1 Bailey, 193; Ferguson v. Clifford, 37 N. H. 86; Livermore v. Jenckes, 21 How. 126; Born v. Shaw, 29 Penn. 288; Balto. & Ohio R. R. Co. v. Hoge, 34 Penn. 214; Chaffee v. Fourth Nat'l Bank, 71 Me. 514; *vide* Woodward v. Gates, 9 Vt. 358; Fishborne v. Kunhardt, 2 Spears, 556; Golden v. Cockril, 1 Kans. 259; Ingraham v. Geyer, 13 Mass. 146; Fox v. Adams, 5 Me. 245; The Watchman, 1 Ware, 232.

[1] Atwood v. Protection Ins. Co., 14 Conn. 555; Sanderson v. Bradford, 10 N. H. 260; Caskie v. Webster, 2 Wall. Jr. 131; Walters v. Whitlock, 9 Fla. 86.

[2] Zipcey v. Thompson, 67 Mass. 243; Ingraham v. Geyer, 13 Mass. 146; Fall River Ironworks Co. v. Croade, 32 Mass. 11; Boyd v. Rockport Mills, 73 Mass. 406; Varnum v. Camp, 13 N. J. 326; Richmondville Manuf. Co. v. Pratt, 9 Conn. 487; Bryan v. Brisbin, 26 Mo. 423; Beirne v. Patton, 17 La. 589; Stricker v. Tinkham, 35 Geo. 176; Guillander v. Howell, 35 N. Y. 657; Hanford v. Paine, 32 Vt. 442; Ramsey v. Stevenson, 5 Martin, 23; Rice v. Curtis, 32 Vt. 460.

upon the principles of comity. The peace and harmony among States and nations, and the mutual protection, security and safety of the rights of the citizens of each, demand that the law of nations should not, on slight grounds, be impaired or disregarded.[1] Even when a transfer is invalid by the laws of the State where the property is located, it will, if valid by the laws of the State where it is made, be binding upon the citizens of that State,[2] and all others except the citizens of the State for whose protection the laws were passed.[3] Citizens of such State who purchase claims after the transfer have only such rights as their vendor had.[4] If a transfer is valid by the laws of the State where it is made, and in which the property is located, it will be valid everywhere.[5]

NOTICE TO DEBTORS.—In the case of an assignment of a debt, notice is necessary to charge the debtor with the duty of payment to the assignee, and if without notice he pays the debt to the assignor or it is recovered by process

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[1] U. S. Bank v. Huth, 4 B. Mon. 423; Hanford v. Paine, 32 Vt. 442.

[2] Benedict v. Parmenter, 78 Mass. 88; Whipple v. Thayer, 33 Mass. 25; Daniels v. Willard, 33 Mass. 36; Burlock v. Taylor, 33 Mass. 335; Moore v. Bonnell, 31 N. J. 90; Mayberry v. Shister, 1 Harring. 349.

[3] Todd v. Bucknam, 11 Me. 41; Sanderson v. Bradford, 10 N. H. 260; Forbes v. Scannell, 13 Cal. 242; *vide* Brown v. Knox, 6 Mo. 302.

[4] Richardson v. Forepaugh, 73 Mass. 546; Hunt v. Lathrop, 7 R. I. 58; Todd v. Bucknam, 11 Me. 41.

[5] Reid v. Gray, 37 Penn. 508; Newman v. Bagley, 33 Mass. 570; Wales v. Alden, 39 Mass. 245; Means v. Hapgood, 36 Mass. 105; Jones v. Taylor, 30 Vt. 42; Forbes v. Scannell, 13 Cal. 242; Goddard v. Winthrop, 74 Mass. 180; Benedict v. Parmenter, 78 Mass. 88; Varnum v. Camp, 13 N. J. 326; Ballard v. Winter, 40 Conn. 179; Thuret v. Jenkins, 7 Martin, 318; Cobb v. Buswell, 37 Vt. 337; Jones v. Taylor, 30 Vt. 42; *vide* Skiff v. Solace, 23 Vt. 279; Montgomery v. Wright, 8 Mich. 143; M'Kaig v. Jones, 6 Penn. 425.

against him, he will be discharged from the debt. Notice after attachment and prior to a recovery is sufficient.[1]

PRESUMPTION OF FOREIGN LAW.—When there is no evidence of what the foreign law is, it will be assumed to be the same as that which governs the tribunal where the question arises.[2]

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[1] Mowry v. Crocker, 6 Wis. 326; Noble v. Smith, 6 R. I. 446; Martin v. Potter, 77 Mass. 37; Walters v. Whitlock, 9 Fla. 86; Bank v. Gettinger, 3 W. Va. 309; *vide* Martin v. Potter, 34 Vt. 87; Rice v. Courtis, 32 Vt. 460.

[2] Russell v. Tunno, 11 Rich. 303; Beirne v. Patton, 17 La. 589; Hurdt v. Courtenay, 4 Met. (Ky.) 139; Green v. Trieber, 3 Md. 11; Sangston v. Gaither, 3 Md. 40; Savage v. O'Neil, 44 N. Y. 298; Ferguson v. Clifford, 37 N. H. 86.

CHAPTER XX.

EXECUTIONS, JUDGMENTS AND ATTACHMENTS.

DIVERTING EXECUTION FROM LEGITIMATE PURPOSE.—The statute avoids all executions issued or kept on foot with intent to delay, hinder, or defraud creditors.[1] The intent may be inferred from circumstances, and if it is established the execution loses its preference. The end and object of an execution is to obtain satisfaction of the debt for which it issues, and being delivered to the proper officer it gives to the creditor a priority, because the law points out the officer's duty, which is to execute it without delay. Any act of the creditor which diverts the execution from its legitimate purpose renders it void against other creditors, and deprives him of his right to priority.[2] It is a creature of the law prepared as a means of enforcing payment, and an attempt to use it as a means of merely obtaining a security diverts it from its purpose, and strips it of the incidents which the law attaches to it when it is used legitimately. A creditor has the right to issue an execution for the purpose of being before other creditors and thus securing or obtaining his debt. All that the law requires is that a man, without meaning to get payment himself, shall not hinder others from getting their money.[3] Consequently, after he has sued out an

[1] Snyder v. Kunkleman, 3 Penna. 487; Burnell v. Johnson, 9 Johns. 243; Howell v. Alkyn, 2 Rawle, 282.

[2] Berry v. Smith, 3 Wash. C. C. 60.

[3] Smith's Appeal, 2 Penn. 331; Brown's Appeal, 26 Penn. 490.

execution, he is bound to be both prompt and honest in the steps he takes to enforce it.

INSTRUCTIONS TO DELAY.—The delivery of an execution to a sheriff with instructions to do nothing under it is no delivery, and confers no privilege upon the creditor. If the creditor instructs the sheriff to make no seizure or levy until he gives him further orders, or until a distant day, and in the meantime another execution comes to the sheriff with orders to proceed, the second writ will in law be deemed the first in order.[1] Such an instruction is inconsistent with an intent to pursue the execution with due diligence. Hence there is no distinction between an instruction to delay for one day and an instruction to delay for one or more months or for an indefinite time.[2] It is the interference on the part of the creditor and not the length of the delay that divests the execution of its priority. The fact that the prior execution was intended to be enforced is immaterial.[3] A direction to the sheriff not to proceed to a sale unless urged on by younger exe-

[1] Cook v. Wood, 16 N. J. 254; Knower v. Barnard, 5 Hill, 377; Patton v. Hayter, 15 Ala. 18; Wood v. Gary, 5 Ala. 43; Branch Bank v. Robinson, 5 Ala. 623; Porter v. Cocke, Peck, 30; Freeburger's Appeal, 40 Penn. 244; Wise v. Darby, 9 Mo. 130; Field v. Liverman, 17 Mo. 218; Kempland v. Macauley, Peake's N. P. C. 65; Bradley v. Wyndham, 1 Wils. 44; Hickman v. Caldwell, 4 Rawle, 376; Smallcomb v. Buckingham, 5 Mod. 375; s. c. 1 Salk. 320; s. c. 1 Ld. Raym. 251; Kellogg v. Griffin, 17 Johns. 274; Storm v. Woods, 11 Johns. 110; U. S. v. Conyngham, 4 Dall. 358; Colby v. Cressy, 5 N. H. 237; Michie v. Planters' Bank, 7 Miss. 130; Kauffelt's Appeal, 9 Watts, 334; Ross v. Weber, 26 Ill. 221; Stern's Appeal, 64 Penn. 447; Truitt v. Ludwig, 25 Penn. 145; Johnson v. Williams, 8 Ala. 529; Palmer v. Clarke, 2 Dev. 354; M'Clure v. Ege, 7 Watts, 74; Mentz v. Haman, 5 Whart. 150; *vide* Snipes v. Sheriff, 1 Bay. 295; Greenwood v. Naylor, 1 McC. 414; Stirling v. Van Cleve, 12 N. J. 285; Swigert v. Thomas, 7 Dana, 220.

[2] Berry v. Smith, 3 Wash. C. C. 60.

[3] Hunt v. Hooper, 12 M. & W. 664.

cutions will likewise render an execution void.[1] The act of the officer must concur with the direction of the creditor in order to defeat the prior lien; therefore a direction without a delay and a delay without direction are equally ineffectual. A direction to delay, provided that a prior execution is paid off, will not postpone an execution if such prior execution is not paid off, for the contingency upon which the direction depended does not occur.[2] A positive and absolute direction to stay proceedings under an execution will not postpone in favor of a junior execution when there is in fact no delay, for the elements of fraud are wanting.[3] A direction after a levy has the same effect as a direction made before a levy.[4] If a countermand is given before the issuing of a second execution, the efficacy of the first execution will be restored.[5] When the direction is merely to delay for a stipulated time, the execution will be good after the expiration of that time.[6] A second execution will not be affected by the delay under a prior execution upon the same judgment.[7]

MERE NEGLECT OF SHERIFF.—Mere delay on the part of the sheriff to make a levy will not postpone a prior to a junior execution,[8] but it always raises a suspicion that an

[1] Pringle v. Isaacs, 11 Price, 445; Weir v. Hale, 3 W. & S. 285; Freeburger's Appeal, 40 Penn. 244; Kimball v. Munger, 2 Hill, 364; Lancaster Savings Inst. v. Wiegand, 3 Penn. L. J. 523; *vide* Houston v. Sutton, 3 Harring. 37; Cumberland Bank v. Hann, 19 N. J. 166; Stirling v. Van Cleve, 12 N. J. 285.

[2] Lancaster Savings Inst. v. Wiegand, 3 Penn. L. J. 523.

[3] Lancaster Savings Inst. v. Wiegand, 3 Penn. L. J. 523.

[4] Branch Bank v. Broughton, 15 Ala. 127.

[5] Berry v. Smith, 3 Wash. C. C. 60; Carter v. Sheriff, 1 Hawks, 483.

[6] Benjamin v. Smith, 4 Wend. 332.

[7] Stirling v. Van Cleve, 12 N. J. 285; Roberts v. Oldham, 63 N. C. 267.

[8] Brown's Appeal, 26 Penn. 490.

execution is set on foot to protect the property from other creditors.[1]

DEBTOR'S POSSESSION AFTER LEVY.—The sheriff is not bound to remove the property after he has made a levy. He may leave it in the actual possession of the debtor until the day of sale, and in such case the law will consider the debtor as the sheriff's agent or bailiff.[2] If there is no intent to postpone the sale and the parties act in good faith, the creditor may also consent that the goods shall be left in the debtor's possession.[3] The debtor, however, can not be permitted to sell or consume the property for his own benefit after the levy.[4] It has also been held

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[1] Lovick v. Crowder, 2 Man. & Ry. 84; s. c. 8 B. & C. 132; West v. Skip, 1 Ves. Sr. 239.

[2] Cumberland Bank v. Hann, 19 N. J. 166; Thompson v. Van Vechten, 5 Abb. Pr. 458; s. c. 6 Bosw. 373; s. c. 27 N. Y. 568; Eberle v. Mayer, 1 Rawle, 366; Levy v. Wallis, 4 Dall. 167; Chancellor v. Phillips, 4 Dall. 213; Casher v. Peterson, 4 N. J. 317; Sterling v. Van Cleve, 12 N. J. 285; Cox v. Jackson, 1 Hayw. 422; Howell v. Alkyn, 2 Rawle, 282; Corlies v. Stanbridge, 5 Rawle, 286. *Contra*, Dutertre v. Driart, 7 Cal. 549; Zug v. Laughlin, 23 Ind. 170; Roberts v. Scales, 1 Ired. 88; Wilson v. Hensley, 4 Ired. 66; Barham v. Massey, 5 Ired. 192; Border v. Benze, 12 Iowa, 330; Tucker v. Bond, 23 Ark. 268.

[3] Doty v. Turner, 8 Johns. 20; Rew v. Barber, 3 Cow. 272; Russell v. Gibbs, 5 Cow. 390; Cumberland Bank v. Hann, 19 N. J. 166; Sterling v. Van Cleve, 12 N. J. 285; Howell v. Alkyn, 2 Rawle, 282; Cox v. M'Dougal, 2 Yeates, 434; Perit v. Webster, 2 Yeates, 524; Keyser's Appeal, 13 Penn. 409. *Contra*, Bucknal v. Roiston, Prec. Ch. 285; Commonwealth v. Stremback, 3 Rawle, 341; Berry v. Smith, 3 Wash. C. C. 60; Lewis v. Smith, 2 S. & R. 142; Parker v. Waugh, 34 Mo. 340.

[4] Matthews v. Warne, 11 N. J. 295; Williamson v. Johnston, 12 N. J. 86; Barnes v. Billington, 1 Wash. C. C. 29; Farrington v. Sinclair, 15 Johns. 428; Knox v. Summers, 4 Yeates, 477; Guardians v. Lawrence, 4 Yeates, 194; Swigert v. Thomas, 7 Dana, 220; Earl's Appeal, 13 Penn. 483; Cook v. Wood, 16 N. J. 254; Cumberland Bank v. Hann, 19 N. J. 166; Bingham v. Young, 10 Penn. 395; *vide* Bernard v. Mosely, 3 Fla. 322.

that he can not even be allowed to sell at private sale for the purpose of raising money to satisfy the execution.[1]

DELAY IN SELLING.—Delay on the part of the sheriff in enforcing an execution will not, of itself, postpone an execution, unless it is so long as to raise a presumption of a consent on the part of the creditor.[2] But if the time is unreasonably long, the execution will be void.[3] A mere adjournment of a sale for a definite period to some time before the return day of the writ does not amount to a waiver,[4] especially when it is done for the purpose of investigating a claim to the property which is brought forward on the day appointed for the sale.[5] But a direction to postpone the sale for an indefinite period, except in the case of growing crops or other articles of that kind, will divest the lien.[6] A sale of wheat growing in the

[1] Pary's Appeal, 41 Penn. 273; Keyser's Appeal, 13 Penn. 409; Truitt v. Ludwig, 25 Penn. 145; Davidson v. Waldron, 31 Ill. 120; Kirkpatrick v. Cason, 30 N. J. 331; M'Clure v. Ege, 7 Watts, 74; Guardians v. Lawrence, 4 Yeates, 194.

[2] Russell v. Gibbs, 5 Cow. 390; Society v. Hitchcock, 98 Mass. 333; Smith's Appeal, 2 Penn. 331; Cumberland Bank v. Hann, 19 N. J. 166; Herkimer Co. Bank v. Brown, Hill, 232; Thompson v. Van Vechten, 5 Abb. Pr. 458; s. c. 6 Bosw. 373; s. c. 27 N. Y. 568; M'Coy v. Reed, 5 Watts, 300; Leach v. Williams, 8 Ala. 759; *vide* Weir v. Hale, 3 W. & S. 285.

[3] Lovick v. Crowder, 8 B. & C. 132; s. c. 2 Man. & Ry. 84; Rice v. Serjeant, 7 Mod. 37; Doty v. Turner, 8 Johns. 20; Russell v. Gibbs, 5 Cow. 390; Benjamin v. Smith, 4 Wend. 332; Earl's Appeal, 13 Penn. 483; Cumberland Bank v. Hann, 19 N. J. 166; Berry v. Smith, 3 Wash. C. C. 60; Deposit Bank v. Berry, 2 Bush, 236; Corlies v. Stanbridge, 5 Rawle, 286; Acton v. Knowles, 14 Ohio St. 18.

[4] Paton v. Westervelt, 12 N. Y. Leg. Obs. 7; Lantz v. Worthington, 4 Penn. 153; Daney v. Hubbis, 71 N. C. 424.

[5] Bushe's Appeal, 65 Penn. 363.

[6] Branch Bank v. Broughton, 15 Ala. 127. *Contra*, Hickman v. Hickman, 3 Harring. 484.

ground may be postponed until it is fit to be reaped.[1] When hides are in vats undergoing the process of tanning, the sale may be postponed until the process is complete.[2]

LAND.—The distinction between liens in cases of real estate and personalty is palpable and well defined. In the one case the judgment confers the lien; in the other it arises out of the execution. In the case of real estate there can be no hindrance from a delay to sell. A junior judgment creditor can levy his execution and proceed to sell lands at any time, the sale being subject to the prior lien. A direction to delay either the levy or the sale will not therefore divest the lien of the judgment in the case of land.[3]

REMEDY AGAINST JUDGMENT.—A fraudulent judgment may be attacked collaterally, either at law or in equity, for it is void as against creditors.[4] It may also be set aside upon an application to the court that rendered it.[5] Such application can only be made by a judgment creditor.[6] When it is made by a proper party the court may direct an issue to try the question of fraud.[7] The issue must be in regard to the alleged fraud and not in regard

[1] Whipple v. Foot, 2 Johns. 418. [2] Power v. Van Buren, 7 Cow. 560.

[3] Ensworth v. King, 50 Mo. 477; Greene v. Allen, 2 Wash. C. C. 280; Muir v. Leitch, 7 Barb. 341.

[4] Imray v. Magnay, 11 M. & W. 267; Wilhelmi v. Leonard, 13 Iowa, 330; Gregg v. Bingham, 1 Hill (S. C.) 299; Hammock v. McBride, 6 Geo. 178; Burns v. Morse, 6 Paige, 108; Hackett v. Manlove, 14 Cal. 85; Mulford v. Stratton, 41 N. J. 466; Shallcross v. Deats, 43 N. J. 177; *vide* Tyler v. Leeds, 2 Stark. 218.

[5] Frasier v. Frasier, 9 Johns. 80; Austin v. Brown, 16 N. J. 268.

[6] Wintringham v. Wintringham, 20 Johns. 296.

[7] Whiting v. Johnston, 11 S. & R. 328; Clark v. Douglas, 62 Penn. 408; Frasier v. Frasier, 9 Johns. 80; M'Neal v. Smith, 1 Yeates, 552; Geist v. Geist, 2 Penn. 441; Sommer v. Sommer, 1 Watts, 303; Beards v. Wheeler, 76 N. Y. 213.

to the amount due.[1] If the judgment is found to be fraudulent it can not be vacated on the record, for it is good between the parties.[2] The doctrine that a purchaser *pendente lite* is bound by a judgment does not apply in favor of a fraudulent judgment.[3]

REMEDY AGAINST EXECUTION.—A fraudulent execution, or an execution issued upon a fraudulent judgment, may be treated as null and void.[4] As the mandate of the writ to the sheriff is to bring the money into court, the court has jurisdiction to determine the priorities between conflicting executions, and may set aside an execution that is fraudulent.[5] It may decide the question in a summary way,[6] but if there is any doubt upon the question of fraud it directs an issue to try it.[7] The sheriff is not bound to try the question of fraud or to decide which of two creditors should have the preference, but he ought to stand indifferent between the parties and not lend himself to either. If he lends his aid to one party and withholds it from the other he must stand or fall by the rights of the party to whom he lends his aid.[8] In an action against the sheriff for making a false return, evidence of fraud in a

[1] Numan v. Kapp, 5 Binn. 73.

[2] Dougherty's Estate, 9 W. & S. 189; Thompson's Appeal, 57 Penn. 185.

[3] Falconer v. Jones, 3 Dev. 334; Haywood v. Sledge, 3 Dev. 338.

[4] Lovick v. Crowder, 8 B. & C. 132; s. c. 2 Man. & Ry. 84; Christopherson v. Burton, 3 Exch. 160; s. c. 18 L. J. Exch. 60; Boardman v. Keeler, 1 Aik. 158; Farrington v. Sinclair, 15 Johns. 428.

[5] Posey v. Underwood, 1 Hill, 262; Sutton v. Pettus, 4 Rich. 163; Lovick v. Crowder, 2 Man. & Ry. 84; s. c. 8 B. & C. 132; Warmoll v. Young, 5 B. & C. 660; s. c. 8 D. & R. 442; Williamson v Johnston, 12 N. J. Eq. 86.

[6] Williamson v. Johnston, 12 N. J. Eq. 86.

[7] Barber v. Mitchell, 2 Dowl. P. C. 574; Matthews v. Warne, 11 N. J. 295; Williamson v. Johnston, 12 N. J. Eq. 86.

[8] Warmoll v. Young, 5 B. & C. 660; s. c. 8 D. & R. 442.

prior judgment or execution is admissible, when he has notice of the fraud or could have discovered it by reasonable diligence.[1] Notice to the deputy is notice to the sheriff himself.[2]

ATTACHMENTS.—There must be an actual seizure to constitute a valid attachment, and the property must not be left under the control of the debtor.[3] If it can not be removed without great injury, as hides in a vat, or paper in the process of being manufactured, or iron ore in an open field, a removal may be dispensed with, but the sheriff must use due diligence to prevent it from being withdrawn from his control.[4] An actual removal is not indispensable. The debtor may, with the permission of the sheriff, be allowed to use such articles as will not be injured by the use.[5] Such use, however, is a badge of fraud.[6] Delay in enforcing an attachment is also evidence of fraud.[7] A prior attachment may be set aside for fraud upon the motion of a subsequent attaching creditor.[8]

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[1] Imray v. Magnay, 11 M. & W. 267; Christopherson v. Burton, 3 Exch. 160; s. c. 18 L. J. Exch. 60; Fairfield v. Baldwin, 29 Mass. 388; Warmoll v. Young, 5 B. & C. 660; s. c. 8 D. & R. 442; *vide* Kempland v. Macaulay, Peake, 65. [2] Imray v. Magnay, 11 M. & W. 267.

[3] Baldwin v. Jackson, 12 Mass. 131.

[4] Mills v. Camp, 14 Conn. 219; Hemmenway v. Wheeler, 31 Mass. 408.

[5] Baldwin v. Jackson, 12 Mass. 131; Train v. Wellington, 12 Mass. 495. [6] Burrows v. Stoddard, 3 Conn. 160.

[7] Reed v. Ennis, 4 Abb. Pr. 393.

[8] Smith v. Gettinger, 3 Geo. 140; Harding v. Harding, 25 Vt. 487; Blaisdell v. Ladd, 14 N. H. 129; Buckman v. Buckman, 4 N. H. 319; Webster v. Harper, 7 N. H. 594; Pike v. Pike, 24 N. H. 384; *vide* Whipple v. Cass, 8 Iowa, 126.

CHAPTER XXI.

EXECUTORS DE SON TORT.

When Grantee Is.—When the grantee retains,[1] or takes the property after the death of the debtor, he may be charged as executor *de son tort*.[2] This is the only way in which the property can be reached, because in no other way can a judgment be obtained establishing the debt and authorizing process against the property as that of the deceased debtor. Unless the property, therefore, could be reached in this way the creditors would be without remedy at law. There may be both a rightful executor and an executor *de son tort* at the same time,[3] and if the rightful executor is also a creditor, he may sue the executor *de son tort* and recover his debt, and the fact that he is rightful executor will not obstruct his action.[4]

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[1] Howland v. Dews, R. M. Charlt. 383.

[2] Rol. Abr. 549, 13 H. 4 f. 4, pl. 9; Stokes' Case, 3 Leon, 57; Stamford's Case, 1 Dall. 94; s. c. 2 Leon. 223; Kitchin v. Dixon, Gouldsb. 116, pl. 12; Edwards v. Harben, 2 T. R. 587; Dorsey v. Smithson, 6 H. & J. 61; Yardley v. Arnold, 1 Car. & M. 434; Sturdivant v. Davis, 9 Ired. 365; Allen v. Kimball, 15 Me. 116; Crunkleton v. Wilson, 1 Browne, 361; Densler v. Edwards, 5 Ala. 31; Wilcox v. Watson, Cro. Eliz. 405; Clayton v. Tucker, 20 Geo. 452; Howland v. Dews, R. M. Charlt. 383; Warren v. Hall, 6 Dana, 450; *vide* King v. Lyman, 1 Root, 104.

[3] Dorsey v. Smithson, 6 H. & J. 61; Foster v. Wallace, 2 Mo. 231; Chamberlayne v. Temple, 2 Rand. 384; Howland v. Dews, R. M. Charlt. 383.

[4] Dorsey v. Smithson, 6 H. & J. 61; Shields v. Anderson, 2 Leigh, 729; Osborne v. Moss, 7 Johns. 161.

It is only in the case of personal property that the grantee can be so charged, for an intermeddling with the real estate of the deceased will not make him an executor *de son tort*.[1] It has also been held that he cannot be so charged when the property has been sold before the decease of the debtor, although he retains the proceeds.[2] He is as responsible when he applies the property to his own use as if he applies it to other uses not sanctioned by law.[3]

How Sued.—An executor *de son tort* may be sued wherever he may be found without reference to the jurisdiction in which the intermeddling with the property took place. A person who takes the property of the decedent in one State and there sells it without legal authority, and removes to another without having disbursed the proceeds in payment of debts or otherwise legally accounted for them, may be charged as executor *de son tort* in the latter State.[4] An executor *de son tort* is, in most respects, considered and treated as executor, and all lawful acts which he does or payments which he makes in a due course of administration are allowed to him. The same form of action is used against him. He is not described as a wrongful executor, but simply alleged to be the executor. He may be joined with the rightful executor in an action against them. He therefore can plead any plea which a rightful executor may. The form of the judgment upon the plea of *ne unques executor* is *de bonis testatoris si vel non de bonis propriis*.[5] He can

[1] King v. Lyman, 1 Root, 104. [2] Morrill v. Morrill, 13 Me. 415.
[3] Stephens v. Barnett, 7 Dana, 257. [4] Densler v. Edwards, 5 Ala. 31.
[5] Howland v. Dews, R. M. Charlt. 383; Stephens v. Barnett, 7 Dana, 257.

not, however, derive any benefit from his wrongful act, and consequently can not retain for his debt.[1]

When Grantee is Heir or Administrator.—In case of a fraudulent conveyance of land to the person who becomes the debtor's heir, the deed is deemed void and he takes as heir,[2] so far as creditors are concerned, and is liable for the debts of his ancestor. If the transfer in such a case consists of personal property, he may be considered as holding it either as heir or executor *de son tort*.[3] When the grantee is also devisee the property may be considered as assets by devise.[4] If the grantee is also executor the property is assets in his hands.[5] Property fraudulently conveyed is a part of the deceased debtor's estate,[6] and constitutes legal and not equitable assets.[7] When the grantee is neither heir nor devisee, nor personal representative, the only remedy of the creditor is against the thing granted or the grantee.[8]

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[1] Shields v. Anderson, 3 Leigh, 729.

[2] Humberton v. Howgill, Hob. 72; O'Connor v. Bernard, 2 Jones, 654; Harrison v. Campbell, 6 Dana, 263.

[3] Warren v. Hall, 6 Dana, 450.

[4] Manhattan Co. v. Osgood, 15 Johns. 162; s. c. 3 Cow. 612.

[5] Burckmyers v. Mairs, Riley, 208; Marr v. Rucker, 1 Humph. 348; Jackson v. Bouley, 1 Car. & M. 97; *vide* Backhouse v. Jett, 1 Brock. 500.

[6] Anon. 2 Rol. Rep. 173.

[7] Shee v. French, 3 Drew, 716.

[8] Ralls v. Graham, 4 Mon. 120; Harrison v. Campbell, 6 Dana, 263.

CHAPTER XXII.

REMEDIES.

No Injunction to Prevent Sale.—It is only by the acquisition of a lien that a creditor has any vested or specified right in the property of his debtor. Before such lien is acquired the debtor has full dominion over his property. He may convert one species of property into another, and he may alienate to a purchaser. The rights of the debtor and those of the creditors are thus defined by positive rules, and the point at which the power of the debtor ceases and the rights of the creditors commence is clearly established. A creditor without such lien can not obtain an injunction to prevent the debtor from disposing of his property, although he has reason to apprehend that such disposition may be fraudulent.[1]

Actions against Grantee.—If a fraudulent disposition has actually been made by the debtor of his property, a creditor can not, in the absence of special legislation,

[1] Uhl v. Dillon, 10 Md. 500; Rich v. Levy, 16 Md. 74; Hubbard v. Hubbard, 14 Md. 356; Moran v. Dawes, Hopk. 365; Wiggans v. Armstrong, 2 Johns. Ch. 144; Brooks v. Stone, 11 Abb. Pr. 220; s. c. 19 How. Pr. 395; Cottrell v. Moody, 12 B. Mon. 500; Shufeldt v. Boehm, 96 Ill. 560; Phelps v. Foster, 18 Ill. 309; Buchanan v. Marsh, 17 Iowa, 494; *vide* Bowen v. Hoskins, 45 Miss. 183; Oberholser v. Greenfield, 47 Geo. 330; Hart v. Hart, 52 Geo. 376; Cubbedge v. Adams, 42 Geo. 124; Dortic v. Dugas, 52 Geo. 231; Moore v. Kidder, 55 N. H. 488; Smith v. Farnum, 56 Geo. 144; Mayer v. Wood, 56 Geo. 427; Crawford v. Spuing, 56 Geo. 611.

bring an action in assumpsit,[1] or on the case,[2] against those who combined and colluded with him. Assumpsit will not lie, for there is neither an express promise nor a privity from which the law will imply a promise to pay the debt of the creditor. An action on the case can not be supported, because the damages are too contingent and remote. As a creditor has no special title in or to the property of the debtor, the only proof of loss or injury which he could make would be that the debtor had fraudulently conveyed it away without receiving any value for it, with the intent to avoid the payment of his demand, and that he had no other means of obtaining payment. Upon such proof he would not be entitled to recover the amount of his debt, for that would still be subsisting and might yet be collected. Nor would he be entitled to recover the value of the property conveyed, for to that he has no better claim than other creditors. The only loss or injury which could be shown would be that he has been deprived of a chance or possibility of obtaining payment from that property. The loss would not even be so great as this, for he might still have a chance of reaching the property or its proceeds in the hands of the fraudulent holder. The value of his chance to secure it and have it applied to the payment of his debt while in the hands of the debtor is all that he has lost, and would be the only basis upon which his damages could be

[1] Aspinwall v. Jones, 17 Mo. 209; Kelsey v. Murphy, 26 Penn. 78.

[2] Adler v. Fenton, 24 How. 407; Lamb v. Stone, 28 Mass. 527; Wellington v. Small, 57 Mass. 145; Smith v. Blake, 1 Day, 258; Green v. Kimble, 6 Blackf. 552; Gardiner v. Sherrod, 2 Hawks, 173; Moody v. Burton, 27 Me. 427; Mowry v. Schroder, 4 Strobh. 69; Austin v. Barrows, 41 Conn. 287. *Contra*, Penrod v. Morrison, 2 Penna. 126; Mott v. Danforth, 6 Watts, 304; Meredith v. Benning, 1 H. & M. 585; Hopkins v. Beebe, 26 Penn. 85; Kelsey v. Murphy, 26 Penn. 78.

estimated. There are no data, tables, or other means by which such a chance can be estimated. The loss or injury is too uncertain and remote for legal estimation. The action can only be maintained by proof of a direct, certain, and material injury. If the creditor, however, has a lien upon the property which has been defeated by the transfer, his damages are sufficiently direct to sustain the action.[1]

CHANGE OF REMEDY.—When the debtor institutes proceedings to reach the property fraudulently conveyed, he may resort to the remedy in force at the time the transfer was made, or any remedy which has been subsequently given. His rights are not affected by the fact that by a subsequent improvement or alteration in the law a better and more effectual or different mode of reaching the property has been created.[2]

ACTIONS AT LAW.—A fraudulent transfer is void at law as well as in equity. It is treated as a nullity everywhere, and a court of law takes cognizance of the fraud as well as a court of equity.[3] In suits at law the question is generally tried in a suit against the sheriff for a false return if he omits to levy, or in an action of trespass or trover if he improperly levies upon the goods of a third person, or by an action directly against the execution creditor for directing the levy, or in trover or detinue against the purchaser at the sheriff's sale, or in an attachment suit.[4] In relation to real estate the question is

[1] Smith v. Tonstall, Carthew, 3; Yates v. Joyce, 11 Johns. 136; Adams v. Paige, 24 Mass. 542; Pickett v. Pickett, 2 Hill Ch. 470.

[2] Blenkinsopp v. Blenkinsopp, 1 De G. M. & G. 495; s. c. 12 Beav. 568; s. c. 21 L. J. Ch. 401.

[3] Mulford v. Peterson, 35 N. J. 127.

[4] Cooke v. Cooke, 43 Md. 522; Henry v. Murphy, 54 Ala. 246.

usually tried in an action of ejectment by the purchaser under the sheriff against the tenant in possession claiming under the disputed title. There are some instances where the remedy at law is deficient. Thus, there is no remedy at law when the property can not be taken on execution or by attachment. In some States it is also held that property fraudulently purchased in the name of another can not be reached in an action at law.[1] In general, however, relief may be had at law as well as in equity, and the determination of the question of fraud can not be withdrawn from the forum which the creditor selects.[2] Fraud may be given in evidence under a general issue which raises the question of title to the property.[3] When a bond of conveyance is fraudulent its validity can only be tested by a sale and not by an attachment.[4]

Bill in Equity.—The remedy most frequently used is a bill in equity, because a court of equity sifts the conscience of the parties and removes the cloud from the title. Fraud constitutes the most ancient foundation of its juris-

[1] Howe v. Bishop, 44 Mass. 26; Garfield v. Hatmaker, 15 N. Y. 475; Page v. Goodman, 8 Ired. Eq. 16; Worth v. York, 13 Ired. 206; Davis v. M'Kinney, 5 Ala. 719; Davis v. Tibbetts, 39 Me. 279; Gray v. Faris, 7 Yerg. 155; Dewey v. Long, 25 Vt. 564; Gowing v. Rich, 1 Ired. 553; Garrett v. Rhame, 9 Rich. 407; Jimmerson v. Duncan, 3 Jones (N. C.) 537; Low v. Marco, 53 Me. 45; Webster v. Folsom, 58 Me. 230; Hamilton v. Cone, 19 Mass. 478; Carlisle v. Tindall, 49 Miss. 229; Haggerty v. Nixon, 26 N. J. Eq. 42. *Contra*, Guthrie v. Gardner, 19 Wend. 414; Arnot v. Beadle, 1 Hill & D. 181; Tevis v. Doe, 3 Ind. 129; Pennington v. Clifton, 11 Ind. 162; Kimmel v. M'Right, 2 Penn. 38; Coleman v. Cocke, 6 Rand. 618; Cecil Bank v. Snively, 23 Md. 253; Cutter v. Griswold, Walk. Ch. 437; Roe v. Irwin, 32 Geo. 39; Godding v. Brackett, 34 Me. 27; Hunt v. Blodgett, 17 Ill. 583.

[2] Marriott v. Givens, 8 Ala. 694; Winch's Appeal, 61 Penn. 424; Fellows v. Lewis, 65 Ala. 343; Blake v. Hubbard, 45 Mich. 1.

[3] Gooch's Case, 5 Co. 60; Ashby v. Minnitt, 8 A. & E. 121; Strohm v. Hayes, 70 Ill. 41; Chamberlain v. Stern, 11 Nev. 268.

[4] Stewart v. Coder, 11 Penn. 90.

diction,[1] and is a sufficient ground for its interposition. It may grant relief although there is ample remedy at law, for no relief is adequate except that which removes the fraudulent title.[2] The relief in equity is different and may be more beneficial than that given by the law. But jurisdiction is not assumed upon the ground either that the subject is appropriate to a court of equity as a court of peculiar jurisdiction, or because that court proceeds upon an interpretation of the statute distinct and different from that given at law.[3] On the contrary, it is entertained in equity notwithstanding it exists at law, and thus entertained because such deceitful practices, dishonest in their concoction, progress, and consummation, are so abhorrent to every tribunal of justice, that every tribunal has authority and is bound to relieve against them according to its respective capacities and methods of proceeding, and because the relief peculiar to a court of equity is more perfect than at law.[4]

When no Remedy at Law.—There are some cases where a remedy will be given in equity even though

[1] Hungerford v. Earle, 2 Vern. 261; Hartshorne v. Eames, 31 Me. 93; Lillard v. M'Gee, 4 Bibb, 165.

[2] Tappen v. Evans, 11 N. H. 311; Bennett v. Musgrove, 2 Ves. Sr. 51; Dodge v. Griswold, 8 N. H. 425; Blenkinsopp v. Blenkinsopp, 1 De G. M. & G. 495; s. c. 12 Beav. 568; 21 L. J. Ch. 401; Sheafe v. Sheafe, 40 N. H. 516; Jones v. Henry, 3 Litt. 427; Mountford v. Taylor, 6 Ves. 788; Lewkner v. Freeman, 2 Freem. 236; s. c. Prec. Ch. 105; Eq. Cas. Abr. 149; Planters' Bank v. Walker, 7 Ala. 926; Sheppard v. Iverson, 12 Ala. 97; Traip v. Gould, 15 Me. 82; Bean v. Smith, 2 Mason, 252; Lillard v. M'Gee, 4 Bibb, 165; Buck v. Sherman, 2 Doug. 176; Fowler v. McCartney, 27 Miss. 509; Cook v. Johnson, 12 N. J. Eq. 51; Musselman v. Kent, 33 Ind. 452; Cox v. Dunham, 8 N. J. Eq. 594; Swift v. Avents, 4 Cal. 390; Brandon v. Gowring, 6 Rich. Eq. 5; Abbey v. Commercial Bank, 31 Miss. 434; Phillips v. Wesson, 16 Geo. 137; Hamlen v. McGillicuddy, 62 Me. 268; Scott v. Ind. Wagon Works, 48 Ind. 75; Gormley v. Potter, 29 Ohio St. 597.

[3] Russell v. Hammond, 1 Atk. 13.

[4] Dobson v. Erwin, 1 Dev. & Bat. 569; s. c. 4 Dev. & Bat. 201.

there is none at law. If the debtor fraudulently purchases property in the name of another, equity treats the grantee as trustee for the creditors, and subjects the property to their demands.[1] A court of equity will also afford a remedy against *choses in action*, stock, and other species of property not liable to an execution at law. Any distinction between property which may and property which may not be taken on execution is inconsistent with the rights which result from the relation of debtor and creditor, and has no foundation in just reasoning. It makes the rights of the creditors depend upon the form and character which the fraud or caprice of the debtor may give to his property. It is difficult to perceive any solid reason why the intangible property and effects of a debtor shall not be subjected to the payment of his debts equally with his chattels, which may be the subject of seizure and sale under an execution at law. The abstract rights of the creditors are as perfect in the one case as in the other. The spirit of an enlightened jurisprudence requires that the property, rights and interests of a debtor, whatever may be their form, if they have an ascertained value, shall be subject to the payment of his debts. Any other rule leads to fraud upon the creditors and encourages dishonesty in the debtor, who would only have to convert

[1] Godbold v. Lambert, 8 Rich. Eq. 155; Odenheimer v. Hansom, 4 M'Lean, 437; Patterson v. Campbell, 9 Ala. 933; State Bank v. Harrow, 26 Iowa, 426; Smith v. McCann, 24 How. 398; Gardiner Bank v. Wheaton, 8 Me. 373; Smith v. Parker, 41 Me. 452; Bertrand v. Elder, 23 Ark. 494; Corey v. Greene, 51 Me. 114; Marshall v. Marshall, 2 Bush. 415; Brown v. McDonald, 1 Hill Ch. 297; Halbert v. Grant, 4 Mon. 580; Dockray v. Mason, 48 Me. 178; Bay v. Cook, 31 Ill. 336; Belford v. Crane, 16 N. J. Eq. 265; Peay v. Sublet, 1 Mo. 449; Newell v. Morgan, 2 Harring. 225; 2 Del. Ch. 20; Demaree v. Driskell, 3 Blackf. 115; McDowell v. Cochran, 11 Ill. 31; Walcott v. Almy, 6 McLean, 23; Gentry v. Harper, 2 Jones Eq. 177; Rucker v. Abell, 8 B. Mon. 566; Gordon v. Lowell, 21 Me. 251.

his property into the bond or promissory note of a third person, or into stock of some kind, and then settle the same upon his family in order to obtain a perfect immunity from his creditors.[1] A court of equity, therefore, for the purpose of enforcing justice, holds the fraudulent grantee as the trustee of those whom he defrauds, and takes jurisdiction to administer this trust.[2] Wherever *choses in action* or other property of a similar character are liable to execution or attachment, the jurisdiction of a court of equity is unquestionable.[3]

CREDITOR MUST HAVE LIEN.—A fraudulent transfer is valid against all persons except those who proceed to appropriate the property by due course of law to the

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[1] Wright v. Petrie, 1 S. & M. Ch. 282; Green v. Tantum, 19 N. J. Eq. 105; s. c. 21 N. J. Eq. 364; Alexander v. Tams, 13 Ill. 221; Odenheimer v. Hansom, 4 McLean, 437; Tappan v. Evans, 11 N. H. 311; Chase v. Searles, 45 N. H. 511; Weed v. Pierce, 9 Cow. 722; Taylor v. Jones, 2 Atk. 600; Catchings v. Manlove, 39 Miss. 655; Partridge v. Gopp, Ambl. 596; s. c. 1 Eden, 163; Hadden v. Spader, 5 Johns. Ch. 280; s. c. 20 Johns. 554; Hartshorne v. Eames, 31 Me. 93; West v. Saunders, 1 A. K. Marsh. 108; Bean v. Smith, 2 Mason, 252; Harlan v. Barnes, 5 Dana, 219; Bay State Iron Co. v. Goodall, 39 N. H. 223; Chase v. Searles, 45 N. H. 511; Treadwell v. Brown, 44 N. H. 551; Smithier v. Lewis, 1 Vern. 398; Anon. 1 Eq. Abr. 132; Sargent v. Salmond, 27 Me. 539; Greer v. Wright, 6 Gratt. 154; Manchester v. McKee, 4 Gilman, 511. *Contra*, Dundas v. Dutens, 1 Ves. Jr. 196; s. c. 2 Cox, 235; Rider v. Kidder, 10 Ves. 360; s. c. 12 Ves. 202; s. c. 13 Ves. 123; Matthews v. Feaver, 1 Cox, 278; Grogan v. Cooke, 2 Ball. & B. 233; Sims v. Thomas, 12 A. & E. 536; s. c. 4 P. & D. 233; s. c. 9 L. J. (N. S.) Q. B. 399; Norcut v. Dodd, 1 Cr. & Ph. 100; Duffin v. Furness, Sel. Cas. Ch. 77; Caillaud v. Estwick, 1 Anst. 381; Stewart v. English, 6 Ind. 176; Cosby v. Ross, 3 J. J. Marsh. 290; Winebreuner v. Weisiger, 3 Mon. 32; Crozier v. Young, 3 Mon. 157; Bickley v. Norris, 2 Brev. 252. In some States this remedy is regulated by statute, but such statutes are generally considered as merely declaratory.

[2] Bean v. Smith, 2 Mason, 252.

[3] Patterson v. Campbell, 9 Ala. 933; Wright v. Petrie, 1 S. & M. Ch. 282.

satisfaction of the grantor's debts. As it is valid against a simple contract creditor, such creditor can not ask the aid of a court of equity to set aside the transfer, for it does not interfere with his rights. Equity has jurisdiction of fraud, but it does not collect debts. A creditor must establish his demand at law, and obtain a lien upon the property, before the transfer interferes with his rights or he has any title to claim relief in equity.[1] No creditor can

[1] Meux v. Anthony, 11 Ark. 411; Smith v. Hurst, 10 Hare, 30; s. c. 15 Eng. L. & Eq. 520; 17 Jur. 30; 22 L. J. Ch. (N. S.) 289; M'Kinley v. Combs, 1 Mon. 105; Griffith v. Bank, 6 G. & J. 424; Day v. Washburn, 24 How. 352; Jones v. Green, 1 Wall. 330; Colman v. Croker, 1 Ves. Jr. 160; Collins v. Burton, 4 De G. & J. 612; Angell v. Draper, 1 Vern. 399; Brinkerhoff v. Brown, 4 Johns. Ch. 671; s. c. 6 Johns. Ch. 139; Webster v. Clark, 25 Me. 313; Webster v. Withey, 25 Mass. 326; Coleman v. Cocke, 6 Rand. 618; Halbert v. Grant, 4 Mon. 580; Carter v. Bennett, 4 Fla. 283; Barrow v. Bailey, 5 Fla. 9; Hendricks v. Robinson, 2 Johns. Ch. 283; s. c. 17 Johns. 438; Beck v. Burdett, 1 Paige, 305; Jones v. Green, 1 Wall. 330; Cropsey v. McKinney, 30 Barb. 47; Neustadt v. Joel, 2 Duer, 530; Willets v. Vandenburgh, 34 Barb. 424; Williams v. Brown, 4 Johns. Ch. 682; Lawton v. Levy, 2 Edw. 197; Reubens v. Joel, 13 N. Y. 488; Greenwood v. Brodhead, 8 Barb. 593; Hall v. Joiner, 1 Rich. (N. S.) 186; Allen v. Camp, 1 Mon. 231; Horner v. Zimmerman, 45 Ill. 14; Stone v. Manning, 3 Ill. 530; Rhodes v. Cousins, 6 Rand. 188; Tate v. Liggatt, 2 Leigh, 84; Kelso v. Blackburn, 3 Leigh, 299; Taylor v. Robinson, 89 Mass. 253; Ishmael v. Parker, 13 Ill. 324; Duberry v. Clifton, Cooke, 328; Lister v. Turner, 5 Hare, 281; Colman v. Croker, 1 Ves. Jr. 160; Wheeler v. Taylor, 6 Ired. Eq. 225; Allen v. Montgomery, 48 Miss. 101; Oberholser v. Greenfield, 47 Geo. 330; Cubbedge v. Adams, 42 Geo. 124; Edgar v. Clevenger, 3 N. J. Eq. 258; Haggerty v. Nixon, 26 N. J. Eq. 42; Claflin v. French, 28 N. J. Eq. 383; Fleming v. Grafton, 54 Miss. 79; Ferguson v. Bobo, 54 Miss. 121; Coombe v. Meade, 2 Cranch C. C. 547; McConnel v. Dickson, 43 Ill. 99; Bennett v. Stout, 98 Ill. 47; Stewart v. Fagan, 2 Woods, 215. It has recently been decided in England that a creditor at large may file a bill, but that the court will only set the transfer aside and leave him to pursue his remedy at law. Reese River Mining Co. v. Atwell, L. R. 7 Eq. 347; s. c. 20 L. T. (N. S.) 163. In the following States the right to file a bill is given to a simple contract creditor by statute, viz. Maryland, Code, Art. 16, sec. 35; Virginia, Code, ch. 179, sec. 2; West Virginia, Code, ch. 133; Tennessee, Code, §§ 4288, 4289; Alabama, Revised Code, sec. 3446; *vide* Crompton v. Anthony, 95 Mass. 33.

be said to be delayed, hindered or defrauded by any conveyance until some property out of which he has a specific right to be satisfied is withdrawn from his reach by a fraudulent conveyance. Such specific right does not exist until he has bound the property by judgment, or by judgment and execution as the case may be, and has shown that he is defrauded by the conveyance in consequence of not being able to procure satisfaction of his debt in a due course of law. Then, and then only, he acquires a specific right to be satisfied out of the property conveyed, and shows that he is a creditor, and is delayed, hindered and defrauded by the conveyance. When a party has thus brought himself within the terms of the statute, he is entitled to the assistance of a court of equity to remove the impediment to his legal rights. In this respect there is no distinction between the creditors of an individual and the creditors of a partnership.[1]

What Liens Sufficient.—The claim for relief rests upon the fact that the creditor has acquired a specific lien upon the property, and that the obstruction interposed prevents a sale at a fair valuation. The bill is filed to remove the obstruction in order that the creditor may obtain a full price for the property. He must therefore proceed at law until he obtains such lien. In the case of land a judgment alone is commonly sufficient.[2] A judg-

[1] Dunlevy v. Tallmadge, 32 N. Y. 457; s. c. 29 How. Pr. 397; s. c. 18 Abb. Pr. 48; Young v. Frier, 9 N. J. Eq. 465; *vide* Lawton v. Levy, 2 Edw. 197.

[2] Vasser v. Henderson, 40 Miss. 519; McCalmont v. Lawrence, 1 Blatch. 232; Gates v. Boomer, 17 Wis. 455; Cornell v. Radway, 22 Wis. 260; Mohawk Bank v. Atwater, 2 Paige, 54; Clarkson v. De Peyster, 3 Paige, 320; Shaw v. Dwight, 27 N. Y. 244; Dargan v. Waring, 11 Ala. 988; Newman v. Willetts, 52 Ill. 98; Weightman v. Hatch, 17 Ill. 281; Baldwin v. Ryan, 3 T. & C. 251; Royer Wheel Co. v. Fielding, 61 How.

ment which has been satisfied,[1] or which was rendered in a cause where the debtor was never served with process and never appeared,[2] is not sufficient. But if the judgment is regular it is sufficient, although no execution can be issued on it at law until it is revived by a *scire facias*.[3] An execution, however, must be issued in order to obtain a lien on personal property.[4] If the execution is returned the lien is lost and a bill cannot then be filed.[5] Another execution, however, may be issued, and the lien thus acquired will be sufficient to support a bill.[6] A lien by attachment,[7] or judgment of condemnation in an attachment,[8] or garnishment,[9] or warrant of distress,[10] is as good

Pr. 437; Buswell v. Lincke, 8 Daly, 518. In the following cases it has been held that an execution must be issued: North American Ins. Co. v. Graham, 5 Sandf. 197; McCullough v. Colby, 5 Bosw. 477; s. c. 4 Bosw. 603; Dana v. Haskill, 41 Me. 25; Wyman v. Fox, 59 Me. 100; Payne v. Sheldon, 43 How. Pr. 1; s. c. 63 Barb. 169; Fox v. Moyer, 54 N. Y. 125; Hyde v. Chapman, 33 Wis. 391; Verner v. Downs, 13 S. C. 449.

[1] Preston v. Turner, 36 Iowa, 671. [2] Tyler v. Peatt, 23 Mich. 63.

[3] Postlewait v. Howes, 3 Iowa, 365; Hagan v. Walker, 14 How. 29.

[4] Jones v. Green, 1 Wall. 330; Clark v. Banner, 1 Dev. & Bat. Eq. 608; Anon. Eq. Cas. Abr. 77, pl. 14; Thurmond v. Reese, 3 Geo. 449; Stephens v. Beall, 4 Geo. 319; Heye v. Bolles, 33 How. Pr. 266; s. c. 2 Daly, 231; Carr v. Parker, 10 Mo. Ap. 364.

[5] Forbes v. Logan, 4 Bosw. 475; Watrous v. Lathrop, 4 Sandf. 700; Bassett v. St. Albans Hotel Co., 47 Vt. 313; Buswell v. Lincke, 8 Daly, 518; *vide* Williams v. Hubbard, Walk. Ch. 28.

[6] Cuyler v. Moreland, 6 Paige, 273.

[7] Hunt v. Field, 9 N. J. Eq. 36; Heyneman v. Dannenberg, 6 Cal. 376; Castle v. Bader, 23 Cal. 75; Dodge v. Griswold, 8 N. H. 425; Stone v. Anderson, 26 N. H. 506; Heye v. Bolles, 33 How. Pr. 266; s. c. 2 Daly, 231; Falconer v. Freeman, 4 Sandf. Ch. 565; Scales v. Scott, 13 Cal. 76; Greenleaf v. Mumford, 19 Abb. Pr. 469; s. c. 30 How. Pr. 30; Williams v. Michenor, 11 N. J. Eq. 520; Robert v. Hodges, 16 N. J. Eq. 299; Tennent v. Butler, 18 Kans. 324; Joseph v. McGill, 52 Iowa, 127; *vide* Martin v. Michael, 23 Mo. 50; Melville v. Brown, 16 N. J. 363; Mills v. Block, 30 Barb. 549; McMinn v. Whelan, 27 Cal. 300.

[8] Smith v. Muirhead, 34 N. J. Eq. 4.

[9] Mechanics' Bank v. Dakin, 51 N. Y. 519; s. c. 28 How. Pr. 502; s.

as a lien by execution. A creditor who intervenes in an attachment suit, claiming the benefit thereof where that is allowed by law, has a sufficient lien.[1] A party to whom a judgment is assigned after the issuing of an execution need not have a new execution issued.[2] If the property consists of both realty and personalty, he may have the conveyance set aside as to the realty, although he did have an execution issued so as to be entitled to have it set aside as to the personalty.[3] Although a creditor did once obtain a lien, yet, if the lien has since expired, he must obtain a lien again before he can proceed in equity.[4]

Return of Execution Unsatisfied when Property not Liable at Law.—There are several exceptions to the rule which requires the creation of a lien prior to the filing of a bill in equity. One exception is where the property is such that it can not be taken on an execution at law. The creditor's right to relief in such case depends upon the fact of his having exhausted his legal remedies without being able to obtain satisfaction. The best and the only evidence of this is the actual return of an execution unsatisfied. The creditor must obtain judgment, issue an execution, and procure a return of *nulla bona* before he can file a bill in equity to obtain satisfaction out of the property of the debtor which cannot be reached at law.[5]

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c. 33 How. Pr. 316; s. c. 50 Barb. 587. *Contra*, Thurber v. Blanck, 50 N. Y. 80; Greenleaf v. Mumford, 19 Abb. Pr. 469; s. c. 30 How. Pr. 30; Bigelow v. Andress, 31 Ill. 322.

[10] Allen v. Camp, 1 Mon. 231; *vide* Belknap v. Hastings, 1 Denio, 190.

[1] Curry v. Glass, 25 N. J. Eq. 108.

[2] Hastings v. Palmer, 1 Clarke, 52. [3] Buswell v. Lincke, 8 Daly, 518.

[4] Partee v. Matthews, 53 Miss. 140; Fleming v. Grafton, 54 Miss. 79.

[5] Beck v. Burdett, 1 Paige, 305; Heacock v. Durand, 42 Ill. 230; Clarkson v. De Peyster, 3 Paige, 320; Crippen v. Hudson, 13 N. Y. 161; McElwain v. Willis, 9 Wend. 548; s. c. 3 Paige, 505; Taylor v. Persee,

A return before the return day of the writ is sufficient if the bill is not filed until after the return day.[1] Whether a return before the return day is sufficient alone is a point upon which the decisions vary.[2] But if an indorsement of *nulla bona* is actually made on the execution, this may be considered as sufficient although it is not filed.[3] If property purchased in the name of another is not liable to an execution at law, there must be a return of the execution.[4]

Second Execution.—Where the right to file a bill to reach property not liable to seizure at law once exists by the return of an execution unsatisfied, if the debtor has either real or personal property which is a proper subject of sale on execution, but which is fraudulently transferred or encumbered for the purpose of protecting it from the execution of the creditor, and has other property which

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15 How. Pr. 417; Beach v. White, Walk. Ch. 495; Tappan v. Evans, 11 N. H. 311; Williams v. Hubbard, Walk. Ch. 28; Brown v. Bank, 31 Miss. 454; Chittenden v. Brewster, 2 Wall. 191; Jones v. Green, 1 Wall. 330; Green v. Tantum, 19 N. J. Eq. 105; s. c. 21 N. J. Eq. 364; Griffin v. Nitcher, 57 Me. 270; McCartney v. Bostwick, 31 Barb. 390; s. c. 32 N. Y. 53; Hamlen v. McGillicuddy, 62 Me. 268; Adsit v. Sanford, 30 N. Y. Supr. 45; *vide* Postlewait v. Howes, 3 Iowa, 365; Gwyer v. Figgins, 37 Iowa, 317; Miller v. Dayton, 47 Iowa, 312; Case v. Beauregard, 101 U. S. 688; Hibernia Ins. Co. v. St. L. & N. Trans. Co., 10 Fed. Rep. 596.

[1] Forbes v. Waller, 4 Bosw. 475; s. c. 25 N. Y. 430; s. c. 25 How. Pr. 166; Reynaud v. O'Brien, 35 N. Y. 99; s. c. 25 How. Pr. 67; Suydam v. Beals, 4 McLean, 12; Knauth v. Bassett, 34 Barb. 31.

[2] Forbes v. Waller, 25 N. Y. 430; s. c. 4 Bosw. 475; s. c. 25 How. Pr. 166; Bowen v. Parkhurst, 24 Ill. 257; *vide* Reynaud v. O'Brien, 25 How. Pr. 67; s. c. 35 N. Y. 99; Beach v. White, Walk. Ch. 495.

[3] Ocean Nat'l Bank v. Olcott, 46 N. Y. 12; Lewis v. Lanphere, 79 Ill. 187.

[4] Des Brisay v. Hogan, 53 Me. 554; Corey v. Greene, 51 Me. 114; Ocean Nat'l Bank v. Olcott, 46 N. Y. 12; Tyler v. Peatt, 30 Mich. 63; Haggerty v. Nixon, 26 N. J. Eq. 42; Call v. Perkins, 65 Me. 439. *Contra*, McCartney v. Bostwick, 32 N. Y. 53; s. c. 31 Barb. 390; Wood v. Robinson, 22 N. Y. 564.

can only be reached by the aid of a court of equity, the creditor may sue out a second execution, so as to obtain a specific lien upon the property which is subject to a sale thereon, and may then file a bill for the double purpose of removing the obstruction which has been fraudulently interposed against the execution at law, and also to reach other property of the debtor which can not be sold on the second execution.[1]

KIND OF JUDGMENTS.—A bill may be filed to enforce a decree in equity,[2] or a magistrate's judgment,[3] or a judgment by confession,[4] as well as a regular judgment at law. A judgment in an attachment suit when the debtor has not been summoned,[5] or a foreign judgment,[6] or process that is void, is not sufficient.[7] Where a judgment is recovered against joint debtors upon service of process on any number less than the whole, a bill can not be maintained to interfere with any disposition of the separate property of those who have not been served,[8] but a trans-

[1] Cuyler v. Moreland, 6 Paige, 273; Wright v. Petrie, 1 S. & M. Ch. 282.

[2] Farnsworth v. Straster, 12 Ill. 482; Clarkson v. De Peyster, 3 Paige, 320; Weightman v. Hatch, 17 Ill. 281.

[3] Bailey v. Burton, 8 Wend. 339; Crippen v. Hudson, 13 N. Y. 161; Harlan v. Barnes, 5 Dana, 219; Newdigate v. Lee, 9 Dana, 17; Ballentine v. Beall, 4 Ill. 203; Henderson v. Brooks, 3 T. & C. 445.

[4] Neusbaum v. Klein, 24 N. Y. 325.

[5] Manchester v. McKee, 9 Ill. 511; Getzler v. Saroni, 18 Ill. 511; *vide* Bailey v. Burton, 8 Wend. 339.

[6] McCartney v. Bostwick, 31 Barb. 390; s. c. 32 N. Y. 53; Farned v. Harris, 19 Miss. 366; Berryman v. Sullivan, 21 Miss. 65; Claflin v. McDermott, 12 Fed. Rep. 375; Davis v. Bruns, 30 N. Y. Supr. 648; *vide* Tarbell v. Griggs, 3 Paige, 207; Bullitt v. Taylor, 34 Miss. 708.

[7] Guerin v. Hunt, 6 Minn. 375; s. c. 8 Minn. 477.

[8] Bilhofer v. Heubach, 15 Abb. Pr. 143; Field v. Chapman, 15 Abb. Pr. 434; s. c. 14 Abb. Pr. 133.

fer of the joint property may be set aside.[1] In such case, however, the persons who have not been served should be made parties.[2]

Equitable Demand.—A second exception to the rule which requires a party to obtain a lien is in the case of a claim which is purely equitable and such as a court of equity will take cognizance of in the first instance. A party who holds such a claim may, when he looks altogether and exclusively to a court of equity and files a bill to enforce his demand, add a prayer for an auxiliary decree to remove obstructions fraudulently interposed to defeat or embarrass the remedial action of the court.[3]

When Debtor Dies.—A third exception to the rule which requires a lien is in a case where the debtor dies before a judgment is obtained against him. In such a case an action against his executor or administrator would be useless, for a judgment would not be evidence for any purpose against the grantee, and after as well as before its rendition an action against the grantee would necessarily be upon the original debt, and not upon the judgment.[4] An action against his heirs would be equally nugatory, for they are only liable to creditors to the extent of the interest and right in the real estate which descends to them from the debtor. A fraudulent deed, however, binds the heirs as well as the debtor, and upon an issue of *riens per descent* the judgment would be in their favor.[5] A court of equity,

[1] Bilhofer v. Heubach, 15 Abb. Pr. 143.

[2] Howard v. Sheldon, 11 Paige, 558.

[3] Halbert v. Grant, 4 Mon. 580; Waller v. Todd, 3 Dana, 503; Shea v. Knoxville & K. R. R. Co., 6 Baxter, 277; Swan v. Smith, 57 Miss. 548; Smith v. Rumsey, 33 Mich. 183; *vide* Williams v. Tipton, 5 Humph. 66; McDermott v. Blois, R. M. Charlt. 281.

[4] Loomis v. Tifft, 16 Barb. 541; Bireley v. Staley, 5 G. & J. 432.

[5] Loomis v. Tifft, 16 Barb. 541.

however, is authorized by the principles which regulate its jurisdiction to interpose at whatever point in the progress of the legal remedy it may appear that the creditor is actually obstructed by the fraudulent transfer or its consequences. As there is no person at law against whom a judgment can be obtained so as to affect the property, the demand is dependent on equity for its ascertainment and enforcement. A court of equity will, therefore, take jurisdiction though there is no judgment.[1] A bill in such a case is not an application for the exercise of the auxiliary jurisdiction of the court, but is a part of its original jurisdiction in equity.[2] If there is a judgment, no return of *nulla bona* is necessary in such a case.[3]

Executor de son Tort.—This is the reason why it is not necessary in the case of personal property to bind it by an action against the grantee as executor *de son tort*. All

[1] Harrison v. Campbell, 6 Dana, 263; Bay v. Cook, 31 Ill. 336; Trippe v. Ward, 2 Geo. 304; Lynch v. Raleigh, 3 Ind. 273; Hagan v. Walker, 14 How. 29; Frazer v. Western, 1 Barb. Ch. 220; s. c. 1 How. App. Cas. 448; Loomis v. Tifft, 16 Barb. 541; Steere v. Hoagland, 39 Ill. 264; Watts v. Gale, 20 Ala. 817; Pharis v. Leachman, 20 Ala. 662; Bireley v. Staley, 5 G. & J. 432; Snodgrass v. Andrews, 30 Miss. 472; Winn v. Barnett, 31 Miss. 653; McDowell v. Cochran, 11 Ill. 31; O'Brien v. Coulter, 2 Blackf. 421; Merry v. Fremon, 44 Mo. 518; Chamberlayne v. Temple, 2 Rand. 384; Spicer v. Ayres, 2 T. & C. 626; Wright v. Campbell, 27 Ark. 637; White v. Russell, 79 Ill. 155; Haston v. Castner, 29 N. J. Eq. 536; Spencer v. Armstrong, 12 Heisk. 707; Shurts v. Howell, 30 N. J. Eq. 418; Armstrong v. Croft, 3 Lea, 191; *vide* Parstowe v. Weedon, 1 Eq. Cas. Abr. 149; Brunsden v. Stratton, Prec. Ch. 520; Brown v. McDonald, 1 Hill Ch. 297; Scriven v. Bostwick, 2 McCord Ch. 410; Mugge v. Ewing, 54 Ill. 236; Estes v. Wilson, 67 N. Y. 264; Allyn v. Thurston, 53 N. Y. 622; Evans v. Hill, 25 N. Y. Supr. 464.

[2] Hagan v. Walker, 14 How. 29; Frazer v. Western, 1 Barb. Ch. 220; s. c. 1 How. App. Cas. 448; Hampson v. Sumner, 18 Ohio, 444; McNaughtin v. Lamb, 2 Ind. 642; Snodgrass v. Andrews, 30 Miss. 472; Pharis v. Leachman, 20 Ala. 662.

[3] Postlewait v. Howes, 3 Iowa, 365.

the creditors have a specific right to be satisfied out of the property of their deceased debtor in the hands of his executor or administrator, if there is a rightful executor or administrator, or, if not, in the hands of his executor *de son tort*, or if there is a rightful executor or administrator and also an executor *de son tort*, out of the debtor's property in the hands of the latter, if there are not sufficient assets in the hands of the former. This is in the nature of a lien, and the executor or administrator and executor *de son tort* are in the nature of trustees for the creditors. A creditor has a right, therefore, to go originally into a court of equity against the grantee as executor *de son tort* for a discovery, account and satisfaction out of the assets in his hands, and in that suit to establish his demand and to show that he can not get satisfaction otherwise, and so is hindered, delayed, and defrauded.[1]

Proceedings against Estate.—A creditor of a deceased debtor may file a bill against a fraudulent grantee without first proceeding against the estate.[2]

Administrator.—When an administrator has the right to file a bill to set aside a fraudulent conveyance made by the decedent, it is not necessary that there shall be a judgment and execution as in the case of a creditor before he can file a bill.[3]

Non-Residents.—Whether judgment must be obtained against a non-resident before a bill can be filed is a point upon which the decisions vary.[4]

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[1] Chamberlayne v. Temple, 2 Rand. 384.

[2] Spencer v. Armstrong, 12 Heisk. 707; Armstrong v. Croft, 3 Lea. 191.

[3] Barton v. Hosner, 31 N. Y. Supr. 467.

[4] Anderson v. Bradford, 5 J. J. Marsh. 69; Scott v. M'Millen, 1 Litt. 302; Greenway v. Thomas, 14 Ill. 271; Ballou v. Jones, 20 N. Y. Supr. 629; Dodd v. Levy, 10 Mo. Ap. 121.

No Relief at Law.—When it appears that there is no relief at law, a court of equity will take jurisdiction and grant such relief as may be proper and necessary.[1]

When Objection may be Taken.—The objection that a party has not obtained a lien or exhausted his remedy at law is one that may be taken at the hearing,[2] and is not obviated by the rendition of a judgment after the filing of the bill.[3]

When Relief Granted.—A bill may be filed as soon as a deed is executed, although it has not been delivered or accepted, for the creditor is not bound to levy upon the property and take the risk of the litigation that may ensue.[4] A court of equity will interpose to prevent the use of a fraudulent judgment,[5] but will not vacate it.[6] The right to impeach a fraudulent transfer is not affected by the fact that the debtor may have other property. The creditor has the choice of the part upon which he will levy, and the debtor can not take away the election.[7]

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[1] Kamp v. Kamp, 46 How. Pr. 143.

[2] Tappan v. Evans, 11 N. H. 311; Meux v. Anthony, 11 Ark. 411; Brown v. Bank, 31 Miss. 454.

[3] Brown v. Bank, 31 Miss. 454; Edgar v. Clevenger, 3 N. J. Eq. 258.

[4] Gasper v. Bennett, 12 How. Pr. 307.

[5] Shaw v. Dwight, 27 N. Y. 244; Burns v. Morse, 6 Paige, 108; Clark v. Bailey, 2 Strobh. Eq. 143. [6] Kaupe v. Bridge, 2 Robt. 459.

[7] Vasser v. Henderson, 40 Miss. 519; Wadsworth v. Haven, 3 Wend. 411; Wadsworth v. Williams, 100 Mass. 126; Gaylord v. Couch, 5 Day, 223; Botsford v. Beers, 11 Conn. 369; Westerman v. Westerman, 25 Ohio St. 500; Gray v. Chase, 57 Me. 558; Gormerly v. Chapman, 51 Geo. 421; Baker v. Lyman, 53 Geo. 339; Edmunds v. Mister, 58 Miss. 765; Gormley v. Potter, 29 Ohio St. 597; Alford v. Baker, 53 Ind. 279; *vide* Eigleberger v. Kibler, 1 Hill Ch. 113; M'New v. Smith, 5 Gratt. 84; Rice v. Perry, 61 Me. 145; Pearson v. Maxfield, 52 Iowa, 76; Love v. Geyer, 74 Ind. 12.

If separate conveyances of different pieces of property are made to different persons for the same fraudulent purpose, a creditor may maintain an action to set aside either conveyance and can not be required to resort to the other.[1] If the creditor, however, has a security that may be first applied to his debt before other property is appropriated toward its payment, he may be compelled to exhaust the security.[2] But he can not be required to relinquish it, nor to bring it in as a common fund for the benefit of other creditors.[3] A court of equity exercises some discretion,[4] and will not interfere where there is an improper combination between the debtor and the creditor to the prejudice of the grantee.[5]

Debtor's Bankruptcy.—If the debtor is declared a bankrupt, the title to the property vests in his assignee. Creditors can not levy upon it[6] or claim property which has otherwise been fraudulently withheld.[7] The assignee may file a bill in equity to set aside a fraudulent conveyance,[8] and this right is vested in him exclusively.[9] If a

[1] Miller v. Dayton, 47 Iowa, 312.

[2] Coutts v. Greenhow, 2 Munf. 363; s. c. 4 H. & M. 485.

[3] Ala. Warehouse Co. v. Jones, 62 Ala. 550.

[4] Bennett v. Musgrove, 2 Ves. Sr. 51; Hall v. Greenly, 1 Del. Ch. 274.

[5] Hemphill v. Hemphill, 34 Miss. 68; Anderson v. Tuttle, 26 N. J. Eq. 144.

[6] Williams v. Merritt, 103 Mass. 184.

[7] Codman v. Freeman, 57 Mass. 306; *vide* Hollinshead v. Allen, 17 Penn. 275.

[8] Carr v. Hilton, 1 Curt. 230, 390; Pratt v. Curtis, 6 N. B. R. 139; Bradshaw v. Klein, 1 N. B. R. 542; s. c. 2 Biss. 20; Shirley v. Long, 6 Rand. 735; Shackleford v. Collier, 6 Bush, 149; Englebert v. Blanjot, 2 Whart. 240; Weber v. Samuel, 7 Penn. 499; Hubbell v. Currier, 92 Mass. 333; Johnson v. May, 16 N. B. R. 425; Nicholas v. Murray, 5 Saw. 320; Crooks v. Stuart, 7 Fed. Rep. 800; Lynch v. Roberts, 57 Md. 150.

[9] *In re* Meyers, 2 Ben. 424; s. c. 1 N. B. R. 581; Stewart v. Isidor et al., 5 Abb. Pr. (N. S.) 68; s. c. 1 N. B. R. 485; Goodwin v. Sharkey, 5 Abb. Pr. (N. S.) 64; s. c. 3 N. B. R. 558; Thomas v. Phillips, 9 Penn.

creditor, however, has obtained a lien he may continue the prosecution of a suit instituted prior to the commencement of the proceedings in bankruptcy.[1] In order to file a bill it is not necessary that the assignee shall have a lien on the property or obtain a return of *nulla bona*.[2] When the bill is filed by the assignee, the creditors are equitable though not necessary parties, and may be joined.[3] If the assignee declines to act, the creditors may file a bill and make him a party defendant.[4] They may also proceed in the same way when an administrator who is authorized by law to institute such proceedings declines to do so.[5] If an assignee has been discharged he need not be made a party.[6]

Other Parties.—A receiver appointed under proceedings supplemental to an execution,[7] and the sheriff, when

355; Allen v. Montgomery, 48 Miss. 101; Edwards v. Coleman, 2 Bibb. 204; Thurmond v. Andrews, 10 Bush, 400; Hambrick v. Bragg, 4 Baxter, 33; McMasters v. Campbell, 41 Mich. 513; Trimble v. Woodhead, 102 U. S. 647.

[1] Sedgwick v. Menck, 6 Blatch. 156; s. c. 1 N. B. R. 675; Stewart v. Isidor et al., 5 Abb. Pr. (N. S.) 68; s. c. 1 N. B. R. 485; Payne v. Able, 7 Bush, 344; Goldsmith v. Russell, 5 De G. M. & G. 547; Storm v. Waddell, 2 Sandf. Ch. 494; Tichenor v. Allen, 13 Gratt. 15; Fetter v. Cirode, 4 B. Mon. 482; Carr v. Farrington, 63 N. C. 560; Wooten v. Clark, 23 Miss. 75; Kimberling v. Hartly, 1 Fed. Rep. 571; *vide* Smith v. Gordon, 6 Law Rep. 313.

[2] Cragin v. Carmichael, 2 Dillon, 519; Cady v. Whaling, 7 Biss. 430; Southard v. Benner, 72 N. Y. 424; Platt v. Matthews, 10 Fed. Rep. 280.

[3] Boone v. Hall, 7 Bush, 66.

[4] Sands v. Codwise, 4 Johns. 536; Freelander v. Holloman, 9 N. B. R. 331; Allen v. Montgomery, 48 Miss. 101; Bates v. Bradley, 31 N. Y. Supr. 84. *Contra*, Glenny v. Langdon, 98 U. S. 20; Moyer v. Dewey, 103 U. S. 301.

[5] Bate v. Graham, 11 N. Y. 237; Henderson v. Brooks, 3 T. & C. 445.

[6] Apperson v. Burgett, 33 Ark. 328.

[7] Porter v. Williams, 9 N. Y. 142; s. c. 12 How. Pr. 107; Hamlin v. Wright, 23 Wis. 491; Donnelly v. West, 24 N. Y. Supr. 564. *Contra*, Higgins v. Gillesheimer, 26 N. J. Eq. 308.

he has levied an attachment,[1] may file a bill. An assignee holding under a voluntary assignment can not.[2] A party who has purchased at a sale under an execution may file a bill to remove the cloud on his title and the impediment to his quiet enjoyment of the property,[3] although he has not obtained a deed,[4] or may not be entitled to a deed until some future day.[5] If the judgment is against the firm in the firm name only, in accordance with a statute, a purchaser at a sale of the property of one partner under an execution thereon acquires no title and can not file a bill in equity to set aside a fraudulent conveyance thereof.[6]

PARTIES COMPLAINANT.—If a creditor has assigned his claim, the bill should be brought by his assignee.[7] A judgment creditor may file a bill in his own name if he owns the judgment, although it was recovered to the use of a third party.[8] One creditor may file a bill in his own name and for his own benefit, and need not make other creditors standing in the same situation parties.[9] It is

[1] Kelly v. Lane, 42 Barb. 594; s. c. 18 Abb. Pr. 299; s. c. 28 How. Pr. 128.

[2] Bishop v. Halsey, 3 Abb. Pr. 400; Pillsbury v. Kingon, 33 N. J. Eq. 287; *vide* Garretson v. Brown, 26 N. J. 425; s. c. 27 N. J. 644; Simpson v. Warren, 55 Me. 18; Swift v. Thompson, 9 Conn. 63.

[3] Bailey v. Burton, 8 Wend. 339; Frakes v. Brown, 2 Blackf. 295; Harrison v. Kramer, 3 Iowa, 343; Gerrish v. Mace, 75 Mass. 250; Gallman v. Perrie, 47 Miss. 131; Ryland v. Callison, 54 Mo. 513; Sale v. McLean, 29 Ark. 612; Barr v. Hatch, 3 Ohio, 527; Swamscott Machine Co. v. Perry, 119 Mass. 125; Gould v. Steinburg, 84 Ill. 170; Mays v. Rose, Freem. Ch. (Miss.) 703; Hager v. Shindler, 29 Cal. 47; Orindorf v. Budlong, 12 Fed. Rep. 24. *Contra*, Hall v. Greenly, 1 Del. Ch. 274; Thigpen v. Pitt, 1 Jones Eq. 49.

[4] Remington Paper Co. v. O'Dougherty, 81 N. Y. 474.

[5] Hoxie v. Price, 31 Wis. 82. [6] McCoy v. Watson, 51 Ala. 466.

[7] Coale v. Mildred, 3 H. & J. 278. [8] Postlewait v. Howes, 3 Iowa, 365.

[9] Grover v. Wakeman, 11 Wend. 187; s. c. 4 Paige, 23; Baker v. Bartol, 6 Cal. 483; Edmeston v. Lyde, 1 Paige, 637; Ballentine v. Beall, 4 Ill. 203; Way v. Bragaw, 16 N. J. Eq. 213; Annin v. Annin, 24 N. J. Eq. 184; Jackman v. Robinson, 64 Mo. 289.

immaterial if there is an older judgment which constitutes a lien upon the property, for the oldest judgment at law will have the preference notwithstanding any decree which may be made in a suit to which the owner of that judgment is not a party.[1] The sheriff and the creditor may unite, for each has an interest in preventing a multiplicity of suits and having the whole matter closed by a single controversy.[2] Several creditors may join in filing a bill, for they have similar rights with respect to the property of their debtor. It is, therefore, proper for them to unite in the same suit for effecting the same end. Such a bill is not multifarious, for it relates to one subject-matter.[3] The fact that one creditor may be entitled to additional and further relief forms no objection to their uniting in a bill for the purpose of obtaining the relief to which they are all entitled.[4] The bill may be filed on behalf of those who institute the proceedings alone, or on behalf of all who may choose to come in and participate in the proceedings.[5] A judgment creditor of the grantor and a simple contract creditor of a firm which was composed of the grantor and the grantee, who has since died, can not join in the same bill.[6] A creditor and an administrator of the grantee can not unite in the same bill to set aside a gift made prior to the grant.[7] The assignor of a judgment may join with

[1] Grover v. Wakeman, 11 Wend. 187; s. c. 4 Paige, 23.

[2] Adams v. Davidson, 10 N. Y. 309.

[3] Lentilhon v. Moffat, 1 Edw. 451; Waller v. Todd, 3 Dana, 503; Comstock v. Rayford, 9 Miss. 423; s. c. 20 Miss. 369; Gannard v. Eslava, 20 Ala. 732; Brinckerhoff v. Brown, 4 Johns. Ch. 671; s. c. 6 Johns. Ch. 139; Clarkson v. De Peyster, 3 Paige, 320; Ruffing v. Tilton, 12 Ind. 259; Williams v. Michenor, 11 N. J. Eq. 520; Wall v. Fairley, 73 N. C. 464.

[4] Clarkson v. De Peyster, 3 Paige, 320.

[5] Edmeston v. Lyde, 1 Paige, 637; Bireley v. Staley, 5 G. & J. 432; Hammond v. Hudson River R. R. Co., 20 Barb. 378.

[6] Bauknight v. Sloan, 17 Fla. 284.

[7] Coleman v. Pinkard, 2 Humph. 185.

the assignee.[1] If the complainant's debt consists of a judgment assigned to him by a trustee of a judgment creditor, he should make the trustee and the creditor parties.[2]

PARTIES DEFENDANT.—Creditors who have liens on the property may file a bill after the appointment of a receiver and make him a party.[3] If the property has been transferred merely as security for a debt, the debtor is a necessary party.[4] If he has parted with the title absolutely he is a proper party, for it is his debt that is sought to be collected, and his fraudulent conduct that requires investigation. But he is not a necessary party, for he has no beneficial interest which can be affected by the litigation.[5] If the debt is against several parties and the conveyance is made by one alone, the other debtors are not necessary parties.[6] If the debtor becomes bankrupt he is not a necessary party to a bill filed by the assignee.[7] If the debtor dies his administrator is a proper but not a neces-

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[1] Beach v. White, Walk. Ch. 495. [2] Cooper v. Gunn, 4 B. Mon. 594.

[3] Gere v. Dibble, 17 How. Pr. 31.

[4] Hammond v. Hudson River Co., 20 Barb. 378.

[5] Leach v. Shelby, 58 Miss. 681; Potter v. Phillips, 44 Iowa, 353; Laughton v. Harden, 68 Me. 208. *Contra*, Sewall v. Russell, 2 Paige, 175; Lovejoy v. Irelan, 17 Md. 525; Gaylords v. Kelshaw, 1 Wall. 81; Lawrence v. Bank, 35 N. Y. 320; s. c. 3 Robt. 142; Beardsley Scythe Co. v. Foster, 36 N. Y. 561; s. c. 34 How. Pr. 97; Allison v. Weller, 6 T. & C. 291; Wallace v. Eaton, 5 How. Pr. 99; Miller v. Hall, 40 N. Y. Sup. 262; Shaver v. Brainard, 29 Barb. 25.

[6] Fox v. Moyer, 54 N. Y. 125; Randolph v. Daly, 16 N. J. Eq. 313; Union Nat'l Bank v. Warner, 19 N. Y. Supr. 306. *Contra*, Postlewaite v. Howes, 3 Iowa, 365.

[7] Buffington v. Harvey, 95 U. S. 99; Benton v. Allen, 2 Fed. Rep. 448; Weise v. Wardle, L. R. 19 Eq. 171. *Contra*, Verselius v. Verselius, 9 Blatch. 189; Johnson v. May, 16 N. B. R. 425.

sary party.[1] The debtor's heirs need not be made parties, for they have no interest in the property.[2]

The grantee is a necessary party.[3] If there is more than one grantee, then all the grantees must be made parties.[4] If the grantee, however, has parted with his interest in the property he is not a necessary party.[5] Although he assumes in the deed to pay certain creditors and makes their claims a charge on the property, yet they are not necessary parties.[6] When the fraudulent conveyance consists of an assignment, the creditors whose debts are provided for in it are not necessary parties.[7] But in other cases of trust the *cestui que trust* is a necessary

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[1] Taylor v. Webb, 54 Miss. 36; Wall v. Fairley, 73 N. C. 464; Jackman v. Robinson, 64 Mo. 289; Bireley v. Staley, 5 G. & J. 432; McCutchen v. Peigne, 4 Heisk. 565; Merry v. Fremon, 44 Mo. 518; Dockray v. Mason, 48 Me. 178; Cornell v. Radway, 22 Wis. 260; Jackson v. Forrest, 2 Barb. Ch. 576. *Contra*, Boggs v. McCoy, 15 W. Va. 344; Bachman v. Sepulveda, 39 Cal. 688; Scriven v. Bostick, 2 McCord Ch. 410; Coates v. Day, 9 Mo. 304; Postlewait v. Howes, 3 Iowa, 365; Peaslee v. Barney, 1 Chip. 331; Chamberlayne v. Temple, 2 Rand. 384; Simpson v. Simpson, 7 Humph. 275; Pharis v. Leachman, 20 Ala. 662; McDowell v. Cochran, 11 Ill. 31; Barton v. Bryant, 2 Ind. 189; Cobb v. Norwood, 11 Tex. 556; Snodgrass v. Andrews, 30 Miss. 472.

[2] Smith v. Grim, 26 Penn. 95; Taylor v. Webb, 54 Miss. 36; Wall v. Fairley, 73 N. C. 464.

[3] Rock v. Dade, May on Fraud, 519; Taylor v. Wyld, 8 Beav. 159; Hightower v. Mustian, 8 Geo. 506; Tichenor v. Allen, 13 Gratt. 15; Edmeston v. Lyde, 1 Paige, 637; Winchester v. Crandall, 1 Clarke, 371; Hammond v. Hudson River Co., 20 Barb. 378; Gray v. Schenck, 4 N. Y. 460; Brevard v. Sumnar, 1 Heisk. 97; Jackman v. Robinson, 64 Mo. 289; *vide* Sockman v. Sockman, 18 Ohio, 362.

[4] Ward v. Hollins, 14 Md. 158. [5] Jackman v. Robinson, 64 Mo. 289.

[6] Union Nat'l Bank v. Warner, 19 N. Y. Supr. 306.

[7] Grover v. Wakeman, 11 Wend. 187; s. c. 4 Paige, 23; Irwin v. Keen, 3 Whart. 347; M'Kinley v. Combs, 1 Mon. 105; Therasson v. Hickok, 37 Vt. 454; Scudder v. Voorhis, 5 Sandf. 271; Bank v. Suydam, 6 How. Pr. 379; Russell v. Lasher, 4 Barb. 232; Rogers v. Rogers, 3 Paige, 379. *Contra*, Thornbury v. Baxter, 24 Ark. 76.

party as well as the trustee, for the beneficiary owns the equitable and ultimate interest to be affected by a decree.[1] All the beneficiaries under an ante-nuptial agreement ought to be made parties, although only a part of them are beneficiaries under a deed of trust executed in pursuance thereof as a post-nuptial settlement.[2] A person through whom the title has passed from the debtor to the grantee is a proper[3] but not necessary party.[4] A purchaser from the grantee is a necessary party.[5] If the property is in fee the administrator of the grantee is not a necessary party.[6] A creditor who intervenes in an attachment suit claiming the benefit thereof is a proper but not necessary party to a bill filed to enforce the attachment lien.[7] Those who had interests in the property prior to the transfer,[8] and the grantor of property which has been fraudulently purchased in the name of another,[9] and a purchaser *pendente lite*,[10] are not necessary parties. A mortgagee who takes his title from a grantee in whose name the property was purchased with the debtor's money

[1] Day v. Wetherby, 29 Wis. 363. *Contra*, Tucker v. Zimmerman, 61 Geo. 599.

[2] Kinnard v. Daniel, 13 B. Mon. 496.

[3] Bennett v. McGuire, 58 Barb. 625; s. c. 5 Lans. 183; Randolph v. Daly, 16 N. J. Eq. 313; Waller v. Shannon, 53 Miss. 500; Martin v. Walker, 19 N. Y. Supr. 46.

[4] Walter v. Riehl, 38 Md. 211; Jackman v. Robinson, 64 Mo. 289; Stout v. Stout, 77 Ind. 537.

[5] Gray v. Schenck, 4 N. Y. 460; Brevard v. Sumnar, 1 Heisk. 97; Potter v. Stevens, 40 Mo. 229; Thornbury v. Baxter, 24 Ark. 76.

[6] McCutchen v. Peigne, 4 Heisk. 365; Cookingham v. Ferguson, 8 Blatch. 488; s. c. 4 N. B. R. 636.

[7] Williams v. Michenor, 11 N. J. Eq. 520.

[8] Venable v. Bank, 2 Pet. 107; Erfort v. Consalus, 47 Mo. 208; Walter v. Riehl, 38 Md. 211; McRae v. Branch Bank, 19 How. 376; Reynolds v. Park, 5 Lans. 149. *Contra*, Williams v. Michenor, 11 N. J. Eq. 520.

[9] Ballentine v. Beall, 4 Ill. 203; Whitmore v. Woodward, 28 Me. 392.

[10] Schafferman v. O'Brien, 28 Md. 565.

is not a necessary party if the validity of his mortgage is not impeached.[1] Several grantees claiming different portions of the property by distinct conveyances may be joined, for the object is to obtain satisfaction out of such property, and this is single.[2] So also where the judgment is joint and separate conveyances are made by each of the debtors, all the grantees may be united.[3]

AVERMENTS OF BILL.—The facts which give jurisdiction to the court and a right to relief must be plainly and succinctly stated. The amount and character of the debt should be set forth, for a decree can not be rendered for other particulars and causes of action not mentioned or alluded to in the pleadings.[4] If the debt consists of a judgment, the bill must show against whom the judgment was rendered.[5] The bill must aver the facts which give a lien or confer jurisdiction without a lien.[6] If it is filed by simple contract creditors it should be filed on behalf of

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[1] Trego v. Skinner, 42 Md. 426.

[2] Hamlin v. Wright, 23 Wis. 491; Chase v. Searles, 45 N. H. 511; Brinckerhoff v. Brown, 4 Johns. Ch. 671; s. c. 6 Johns. Ch. 139; Fellows v. Fellows, 4 Cow. 682; Allen v. Montgomery R. R. Co., 11 Ala. 437; Snodgrass v. Andrews, 30 Miss. 472; North v. Bradway, 9 Minn. 183; Boyd v. Hoyt, 5 Paige, 65; Hammond v. Hudson Co., 20 Barb. 378; Way v. Bragaw, 16 N. J. Eq. 213; Randolph v. Daly, 16 N. J. Eq. 313; Bank v. Suydam, 6 How. Pr. 379; Reed v. Stryker, 4 Abb. Ap. 26; Trego v. Skinner, 42 Md. 426; Waller v. Shannon, 53 Miss. 500; Donovan v. Dunning, 69 Mo. 436; Bauknight v. Sloan, 17 Fla. 284; Bank v. Harris, 84 N. C. 206; Van Kleeck v. Miller, 19 N. B. R. 484.

[3] Planters' Bank v. Walker, 7 Ala. 926; Royer Wheel Co. v. Fielding, 61 How. Pr. 437.

[4] Walthall v. Rives, 34 Ala. 91; Strike v. M'Donald, 2 H. & G. 191; s. c. 1 Bland, 57.

[5] Lipperd v. Edwards, 39 Ind. 165.

[6] McElwain v. Willis, 9 Wend. 548; s. c. 3 Paige, 505; Beardsley Scythe Co. v. Foster, 36 N. Y. 561; s. c. 34 How. Pr. 97.

all the creditors.[1] The fact that the debtor has transferred his property must be specifically and formally alleged,[2] and a description of the property must also be given.[3] In order to create a *lis pendens* the bill must be so definite in the description that any one reading it can learn thereby what property is intended to be made the subject of litigation.[4] An amended bill for this purpose only operates from the time of the service of process under it.[5] The bill must also state facts from which the inference may be drawn that the aid of a court of equity is required to obtain satisfaction of the debt. It is not enough to show that the debtor has made a fraudulent disposition of his property. The creditor must show that such disposition embarrasses him in obtaining satisfaction of his debt, for if the debtor at the time of the filing of the bill has other property sufficient to satisfy the debt, there is no necessity for the creditor to resort to equity.[6] When the debtor is deceased, the bill must allege a deficiency[7] of the personal assets. An exhaustion of them, however, need not be alleged.[8] If a partnership creditor seeks to reach individual property which has been disposed of by a fraudulent conveyance, it is not necessary

[1] Reese River Mining Co. v. Atwell, L. R. 7 Eq. 347; s. c. 20 L. T. (N. S.) 163; Barton v. Bryant, 2 Ind. 189; Strike v. M'Donald, 2 H. & G. 191; s. c. 1 Bland, 57; Wright v. Campbell, 27 Ark. 637; Hunt v. Field, 9 N. J. Eq. 36.

[2] McElwain v. Willis, 9 Wend. 548; s. c. 3 Paige, 505.

[3] King v. Trice, 3 Ired. Eq. 568.

[4] Miller v. Sherry, 2 Wall. 237; McCaulay v. Rodes, 7 B. Mon. 462.

[5] Miller v. Sherry, 2 Wall. 237.

[6] Dunham v. Cox, 10 N. J. Eq. 437; Harris v. Taylor, 15 Cal. 348; Payne v. Sheldon, 63 Barb. 169; s. c. 43 How. Pr. 1; Bruker v. Kelsey, 72 Ind. 51; Baugh v. Boles, 35 Ind. 524.

[7] State Bank v. Ellis, 30 Ala. 478; Quarles v. Grigsby, 31 Ala. 172.

[8] McLaughlin v. Bank of Potomac, 7 How. 220.

that he shall allege that he has exhausted the partnership assets.[1] A creditor who takes judgment against a surviving partner alone, may make the judgment out of his individual property.[2]

CHARGE OF FRAUD.—Fraud must be charged,[3] and this should in general be done by setting forth the facts which constitute the fraud.[4] A mere allegation imputing motives of fraud is not sufficient.[5] But an averment of an intent to delay, hinder or defraud creditors is not an averment of a conclusion of law but of an essential fact.[6] Fraud may be sufficiently averred by setting forth the particular manner in which the act was done and the particular end and design to be accomplished. Where the facts thus stated show that a fraud was designed and perpetrated, that may be a sufficient averment of the fraud, although the bill does not state the conclusion which the law itself will draw that the act was fraudulent.[7] The bill should aver that the debtor at the time of the transfer did not have enough other property left to satisfy all his debts, whether the transfer was voluntary,[8] or tainted

[1] Randolph v. Daly, 16 N. J. Eq. 313; *vide* Postlewait v. Howes, 3 Iowa, 365.

[2] Postlewait v. Howes, 3 Iowa, 365.

[3] Richardson v. Horton, 7 Beav. 112; Baker v. Chandler, 51 Ind. 85; Carter v. Dickinson, 13 Ir. Ch. 109.

[4] Prentice v. Madden, 4 Chand. 170; Catchings v. Manlove, 39 Miss. 655; Kinder v. Macy, 7 Cal. 206; Meeker v. Harris, 19 Cal. 278; Harris v. Taylor, 15 Cal. 348; Jessup v. Hulse, 29 Barb. 539; s. c. 21 N. Y. 168; Hovey v. Holcomb, 11 Ill. 660; Rowland v. Coleman, 45 Geo. 204; Pence v. Croan, 51 Ind. 336.

[5] Rowland v. Coleman, 45 Geo. 204; Flewellen v. Crane, 58 Ala. 627; Pickett v. Pipkin, 64 Ala. 920; Galloway v. Peoples' Bank, 54 Geo. 441; Steele v. Moore, 54 Ind. 52.

[6] Platt v. Mead, 9 Fed. Rep. 91; Morgan v. Bogue, 7 Neb. 429.

[7] Hovey v. Holcomb, 11 Ill. 660; Catchings v. Manlove, 39 Miss. 655; Moreland v. Atchison, 34 Tex. 351.

[8] Sherman v. Hogland, 54 Ind. 578; Brookbank v. Kennard, 41 Ind. 339; Romine v. Romine, 59 Ind. 346; Platt v. Mead, 9 Fed. Rep. 91.

with actual fraud.[1] If the transfer was made for a valuable consideration, there must be an allegation that the grantee participated in the fraud.[2] If the transfer, however, was voluntary, an allegation that the donee participated in the fraud is not necessary.[3] When the complainant apprehends that the defendant will plead the statute of limitations against him, he should aver in his bill that the fraud has been discovered within such a period previous to the commencement of the suit as will prevent the bar.[4] Certainty to a common intent is all that is required in chancery pleadings. The accuracy which would exclude every other conclusion is not required.[5]

Supplemental Bill.—An indorser who has taken up the note which constituted the debt can not have a pending bill in the name of the holder prosecuted for his use, for the payment to the holder put an end to the suit.[6] When a bill has been filed by a simple contract creditor to enforce the trust arising from an assignment, he may, after obtaining judgment and upon a subsequent discovery

[1] Ewing v. Patterson, 35 Ind. 326; Baugh v. Boles, 35 Ind. 524; Pence v. Croan, 51 Ind. 336; Deutsch v. Kossmeier, 59 Ind. 373; Wedekind v. Parsons, 64 Ind. 290; Alford v. Baker, 53 Ind. 279; Spaulding v. Myers, 64 Ind. 264; Pfeifer v. Snyder, 72 Ind. 78; Spaulding v. Blythe, 73 Ind. 93; Evans v. Hamilton, 56 Ind. 34; Bentley v. Dunkle, 37 Ind. 374; Price v. Sanders, 60 Ind. 310; Wiley v. Bradley, 67 Ind. 560; Whitesel v. Hiney, 60 Ind. 68; Noble v. Hines, 72 Ind. 12; *vide* Hager v. Shindler, 29 Cal. 47.

[2] Klein v. Horine, 47 Ill. 430; Spaulding v. Myers, 64 Ind. 264.

[3] Laughton v. Hardin, 68 Me. 208; Spinner v. Weick, 50 Ind. 213.

[4] McLure v. Ashby, 7 Rich. Eq. 430; Erickson v. Quinn, 3 Lans. 299; s. c. 47 N. Y. 410; Carr v. Hilton, 1 Curt. 230, 390; Shannon v. White, 6 Rich Eq. 96; Combs v. Watson, 32 Ohio St. 208.

[5] Pope v. Wilson, 7 Ala. 690.

[6] Heighe v. Farmers' Bank, 5 H. & J. 68.

of fraud, file a supplemental bill to set aside the assignment, for the subject matter of both the original and supplemental bill is the debt due to the complainant and the trust fund out of which he seeks payment.[1]

Objection to Joinder of Parties.—The defendant waives the objection of a misjoinder of complainants by answering the bill.[2] When a bill is defective for want of proper parties, and this defect appears on its face, it is liable to a demurrer,[3] but if the defect does not appear on its face, the objection can only be taken by plea or answer disclosing who are proper parties.[4] An objection to the nonjoinder of a party defendant which is not taken by demurrer or answer may be disregarded at the hearing,[5] unless he is a necessary party.[6] Where an objection to the want of proper parties is taken at hearing, the case may be continued with leave to bring in the necessary parties.[7]

If a proper decree can be made consistent with the general scope of the bill without causing any embarrassment to any of the parties as to any other rights which they may have or the parties or the court in executing the decree, the bill will not be dismissed at the hearing for multifariousness.[8]

Pleading.—No matter can be pleaded in bar of the recovery merely when it would be equally valid as a

[1] Baker v. Bartol, 6 Cal. 483.

[2] Annin v. Annin, 24 N. J. Eq. 184; Lyman v. Place, 26 N. J. Eq. 30.

[3] Hightower v. Mustian, 8 Geo. 506.

[4] Bay State Iron Co. v. Goodall, 39 N. H. 223; M'Kinley v. Combs, 1 Mon. 105.

[5] Stanwix Bank v. Leggett, 51 N. Y. 552; Martin v. Walker, 19 N. Y. Supr. 46; Union Nat'l Bank v. Warner, 19 N. Y. Supr. 306; Dewey v. Moyer, 16 N. Y. Supr. 473. [6] Postlewait v. Howes, 3 Iowa, 365.

[7] Postlewait v. Howes, 3 Iowa, 365.

[8] Hays v. Doane, 11 N. J. Eq. 84.

defense to the relief.[1] It is the right of the defendant to verify his answer by an affidavit, and the complainant can not deprive him of it by waiving an answer under oath.[2] The grantee is the party who is interested in defeating the suit, and he can not be prejudiced by the conduct of the debtor. The fact that the debtor suffers the bill to be taken *pro confesso*,[3] or admits the fraud in his answer,[4] will not affect the grantee. If the bill is filed to reach property conveyed by the husband to another and by the latter to the wife, the answer of the husband denying the fraud in the conveyance made by him enures to the benefit of the wife.[5] Whether a party can protect himself from making a discovery on the ground that he will thereby subject himself to a criminal prosecution or a forfeiture can not be considered as yet settled.[6] To so much of the bill as is material and necessary for the defendant to answer, he must speak directly and without evasion. He must answer the charge not merely literally but confess or traverse the substance of each charge positively and with certainty, and particular precise charges must be answered particularly and precisely, and not in a general manner, even though a general denial may amount to a full denial

[1] Brownell v. Curtis, 10 Paige, 210.

[2] Clements v. Moore, 6 Wall. 299.

[3] Sands v. Hildreth, 2 Johns. Ch. 35; s. c. 14 Johns. 493; Hollister v. Loud, 2 Mich. 309; Dick v. Hamilton, 1 Deady, 322; Fulton v. Woodman, 54 Miss. 158; Thames v. Rembert, 63 Ala. 561.

[4] Glenn v. Grover, 3 Md. 212; s. c. 3 Md. Ch. 29; Scheitlin v. Stone, 43 Barb. 634; s. c. 29 How. Pr. 355; Kittering v. Parker, 8 Ind. 44; Hord v. Rust, 4 Bibb, 331.

[5] Salmon v. Smith, 58 Miss. 399.

[6] Bunn v. Bunn, 3 New Rep. 679; s. c. 12 W. R. 561; Wich v. Parker, 22 Beav. 59; Michael v. Gay, 1 F. & F. 409; Bay State Iron Co. v. Goodall, 39 N. H. 223; Devoll v. Brownell, 22 Mass. 448; Horstman v. Kaufman, 97 Penn. 147; *vide* Reg. v. Smith, 6 Cox C. Cas. 31; Creswell & Coke's Case, 2 Leon. 8.

of the charges.[1] When he is required to meet an allegation that the debtor had no other property, he must do so directly or by a statement of facts which negative it.[2] A party who claims protection as a purchaser without notice of the fraud must deny notice fully and particularly, and such denial must extend to the time of paying the money and receiving the transfer.[3]

SUPPLEMENTAL ANSWER. — An answer cannot be amended. The practice is to permit the defendant, upon a proper case, to file a supplemental answer, thus giving the complainant the benefit of the original answer with the explanations or denials contained in the supplemental answer. Under such an answer, if the defendant by mistake or misapprehension of the facts, or of his rights, has made an admission in his original answer which is inconsistent with the truth, he has an opportunity by proofs to show the truth and thus relieve himself from the consequences of his mistake.[4] When a supplemental bill is filed after the original bill has been answered, the answer to the supplemental bill must be restricted to the matters stated in it, for the defendant has no right, under pretext of answering the supplemental bill, to add to or amend his answer to the original bill.[5]

CROSS-BILL.—A voluntary grantee may subject other property of the grantor first to the satisfaction of the

[1] Barrow v. Bailey, 5 Fla. 9; Croft v. Arthur, 3 Dessau. 223; Phippen v. Durham, 8 Gratt. 457; Bailey v. Nicoll, 1 Edw. 32.

[2] Welcker v. Price, 2 Lea, 666.

[3] Miller v. Fraley, 21 Ark. 22; Byers v. Fowler, 12 Ark. 218; Stanton v. Green, 34 Miss. 576; Friedenwald v. Mullan, 10 Heisk. 226.

[4] Hughes v. Bloomer, 9 Paige, 269.

[5] Richards v. Swan, 7 Gill. 366; s. c. 2 Md. Ch. 111.

creditor's claim by a proper cross-bill.[1] The debtor may present his claim to an exemption by a cross-bill, for it is germane to and grows out of the original bill.[2] If the grantee files a bill to restrain a sale under an execution, the execution creditor can not by a cross-bill have the deed declared null, for he can not make the grantor a party.[3]

MATTER RESPONSIVE TO THE BILL IS EVIDENCE.—Statements in the answer responsive to the averments in the bill are evidence in favor of the defendant,[4] but averments which are not responsive to the bill must be sustained by proof.[5] Statements which consist of explanations or qualification of an admission are responsive,[6] but when the answer admits a fact and insists upon a distinct fact by way of avoidance, the fact admitted is established, but the fact insisted upon must be proved; otherwise the admission stands as if the fact in avoidance had not been averred.[7]

HOW DENIAL MAY BE OVERCOME.—A denial of fraud in the answer is not conclusive.[8] An answer, however,

[1] Leonard v. Forcheimer, 49 Ala. 145.

[2] Thomason v. Neeley, 50 Miss. 310. [4] Shaw v. Millsaps, 50 Miss. 380.

[3] Dewey v. Littlejohn, 2 Ired. Eq. 495; Pomeroy v. Manin, 2 Paine, 476; Blow v. Gage, 44 Ill. 208; Phettiplace v. Sayles, 4 Mason, 312; Glenn v. Randall, 2 Md. Ch. 220; Green v. Tanner, 49 Mass. 411; Hartshorne v. Eames, 31 Me. 93.

[4] Sanborn v. Kittredge, 20 Vt. 632; McNeal v. Glenn, 4 Md. 87; s. c. 3 Md. Ch. 349; Grover v. Wakeman, 4 Paige, 23; s. c. 11 Wend. 187.

[5] Glenn v. Randall, 2 Md. Ch. 220; Eastman v. M'Alpin, 1 Geo. 157; Glenn v. Grover, 3 Md. 212; s. c. 3 Md. Ch. 29.

[6] Clements v. Moore, 6 Wall. 299; Randall v. Phillips, 3 Mason, 378; Cummings v. McCullough, 5 Ala. 324; Brown v. M'Donald, 1 Hill Ch. 297; Hampson v. Sumner, 18 Ohio, 444; Stanton v. Green, 34 Miss. 576.

[7] How v. Camp, Walk. Ch. 427; Miller v. Tolleson, Harp. Ch. 145; Edginton v. Williams, Wright, 439; Griffin v. Wardlaw, Harp. Ch. 481; Burtus v. Tisdall, 4 Barb. 571; Dick v. Grissom, 1 Freem. Ch. (Miss.) 428; King v. Payan, 18 Ark. 583; Ing v. Brown, 3 Md. Ch. 321.

which is responsive to the bill and denies the allegations made therein in regard to the motives and intentions of the parties is conclusive, unless it is overcome by the testimony of two witnesses, or of one witness with corroborating circumstances.[1] If the answer, however, admits facts from which a conclusive presumption of a fraudulent intent must be drawn, the denial of the answer is overcome.[2] A positive denial will not prevail against admissions in the answer of facts which show that the transfer was fraudulent.[3] Pregnant or slight circumstances, however, are not sufficient.[4] When there is a general denial of all fraud, facts specifically and particularly charged in the bill can not be taken to be true although they are not denied in the answer, for objections to the answer for the want of particularity and fullness should be taken by exceptions to its sufficiency.[5] To give the defendant, however, the full benefit of an answer, so far as to require more than one witness to control it, the answer must be direct and specific as to the matter charged in the bill.

[1] Moffatt v. McDowell, 1 McCord Ch. 434; Myers v. Kinzie, 26 Ill. 36; Blow v. Gage, 44 Ill. 208; Feigley v. Feigley, 7 Md. 537; Glenn v. Grover, 3 Md. 212; s. c. 3 Md. Ch. 29; Green v. Tanner, 49 Mass. 411; Gray v. Faris, 7 Yerg. 155; Allen v. Mower, 17 Vt. 61; Allen v. White, 17 Vt. 69; Jenison v. Graves, 2 Blackf. 440; Clark v. Bailey, 2 Strobh. Eq. 143; Parkhurst v. McGraw, 24 Miss. 134; Kittering v. Parker, 8 Ind. 44; Culbertson v. Luckey, 13 Iowa, 12; Wright v. Wheeler, 14 Iowa, 8; Wightman v. Hart, 37 Ill. 123; Walter v. McNabb, 1 Heisk. 703; Hoboken Bank v. Beekman, 33 N. J. Eq. 53.

[2] Grover v. Wakeman, 11 Wend. 187; s. c. 4 Paige, 23; Cunningham v. Freeborn, 11 Wend. 241; s. c. 1 Edw. 256; s. c. 3 Paige, 537; Fiedler v. Day, 2 Sandf. 594; Cook v. Johnson, 12 N. J. Eq. 51.

[3] Robinson v. Stewart, 10 N. Y. 189; Belford v. Crane, 16 N. J. Eq. 265; Litchfield v. Pelton, 6 Barb. 187.

[4] Glenn v. Grover, 3 Md. 212; s. c. 3 Md. Ch. 29; How v. Camp, Walk. Ch. 427.

[5] Parkman v. Welch, 36 Mass. 231; Waterbury v. Sturtevant, 18 Wend. 353; McRea v. Branch Bank, 29 How. 376.

So in weighing the whole evidence in the case the fact that the defendant only answers generally will operate against him wherever the bill charges him with particular acts of fraud. The circumstance that the defendant omits to deny the facts in the same explicit manner as they are charged raises the presumption that the appeal to his conscience has been somewhat effectual, and that he proposes shielding himself under a denial of the legal effect of his actions rather than to deny under oath the particular acts imputed to him.[1] When the cause is heard on bill and answer, all pertinent facts stated in the answer must be taken to be true.[2] In such case mere badges of fraud disclosed in the answer are not sufficient to overcome the denial of fraud.[3]

Other Creditors.—The practice of permitting other creditors to come in and make themselves parties to a creditor's bill and thereby obtain the benefit, assuming at the same time their portion of the costs and expenses, is well settled.[4]

Statute of Limitations.—The statute of limitations is never considered as an objection to the payment of a claim unless it is specially relied on.[5] The plea may be set up as a bar to the demand[6] or to the title to the property.

[1] Parkman v. Welch, 36 Mass. 231; Waterbury v. Sturtevant, 18 Wend. 353; Hawkins v. Allston, 4 Ired. Eq. 137; Enders v. Swayne, 8 Dana, 103; Gamble v. Johnson, 9 Mo. 605.

[2] Heydock v. Stanhope, 1 Curt. 471; Heacock v. Durand, 42 Ill. 230.

[3] Marshall v. Croom, 52 Ala. 554.

[4] Myers v. Fenn, 5 Wall. 205; Strike v. M'Donald, 2 H. & G. 191; s. c. 1 Bland, 57.

[5] Strike v. M'Donald, 2 H. & G. 191; s. c. 1 Bland, 57.

[6] McDowell v. Goldsmith, 6 Md. 319; s. c. 2 Md. Ch. 370; s. c. 24 Md. 214; Lott v. De Graffenreid, 10 Rich. Eq. 346; M'Clenney v. M'Clenney, 3 Tex. 192; Fox v. Wallace, 30 Miss. 660.

Such a plea can not be put in after a defense has been made to the claim.[1] In determining its sufficiency the substance of the objection must govern rather than the form in which it is presented.[2] The original complainant may rely upon the statute of limitations in opposition to the claims of other creditors who come in after the institution of the suit.[3] The plea of the statute of limitations in the answer will not apply to claims that are filed subsequently. The defense as to such claims must be taken by exceptions.[4] The complainant's claim to relief is to be referred to his right at the time of filing the bill, and if it was well founded and in full force at the time, it will not be barred by lapse of time during the pendency of the suit.[5] The statute continues to run against other creditors until they come in by filing their petition or the vouchers of their claims.[6] If a judgment is recovered against the debtor after the transfer, but before the claim is barred, the original claim becomes merged in the judgment, and the plea of limitations against the original claim will not avail.[7] If the claim, however, is barred before judgment, a confession of judgment by the debtor after the transfer will not defeat the plea.[8] If the statute began to

[1] Williams v. Banks, 19 Md. 22; s. c. 11 Md. 198.

[2] McDowell v. Goldsmith, 24 Md. 214; s. c. 2 Md. Ch. 370; s. c. 6 Md. 319.

[3] Strike v. McDonald, 2 H. & G. 191; s. c. 1 Bland, 57; McDowell v. Goldsmith, 6 Md. 319; s. c. 2 Md. Ch. 370; s. c. 24 Md. 214.

[4] Williams v. Banks, 11 Md. 198; s. c. 19 Md. 22; McDowell v. Goldsmith, 24 Md. 214; s. c. 2 Md. Ch. 370; s. c. 6 Md. 319.

[5] Hunt v. Knox, 34 Miss. 655.

[6] Strike v. McDonald, 2 H. & G. 191; s. c. 1 Bland, 57; McDowell v. Goldsmith, 6 Md. 319; s. c. 2 Md. Ch. 370; s. c. 24 Md. 214.

[7] Schafferman v. O'Brien, 28 Md. 565; Williams v. Banks, 11 Md. 198; s. c. 19 Md. 22.

[8] McDowell v. Goldsmith, 24 Md. 214; s. c. 2 Md. Ch. 370; s. c. 6 Md. 319; *vide* Jones v. Read, 1 Humph. 335.

run before the conveyance, it is not suspended thereby.[1] If the claim in case of the debtor's death is not presented to his personal representatives within the time prescribed by law, it is barred.[2]

Limitation as to Title.—Although a fraudulent conveyance is voidable as against creditors, yet the title of the grantee is within the protection of the statute of limitations.[3] Nor is he precluded from claiming the benefit of the statute by the fact that he is for some purposes treated as a trustee for the creditors, for he is merely a trustee against his will by operation of law.[4] But in order that he may obtain the benefit of the statute, the conveyance must be recorded or there must be a change of possession. If there is neither a record of a conveyance nor a change of possession, the statute does not apply to the transaction, for no length of possession by the debtor will bar the claim of a creditor.[5] There is a conflict among the decisions as to the time from which the statute begins to run when there is a record of a conveyance or a change of possession. In some it is held that the statute begins to run from the date of the conveyance;[6] in others, from the time when the creditor obtains judgment;[7] in

[1] Reed v. Minell, 30 Ala. 61. [2] Halfman v. Ellison, 51 Ala. 543.

[3] Porter v. Cocke, Peck, 30; Blanton v. Whitaker, 11 Humph. 313; Robbins v. Sackett, 23 Kans. 301; Lockard v. Nash, 64 Ala. 365.

[4] Musselman v. Kent, 33 Ind. 452; Bobb v. Woodward, 50 Mo. 95.

[5] Belt v. Raguet, 27 Tex. 471; Peterson v. Williamson, 2 Dev. 326; Dobson v. Erwin, 4 Dev. & Bat. 201; 1 Dev. & Bat. 569; Law v. Smith, 4 Ind. 56.

[6] Reeves v. Dougherty, 7 Yerg. 222; Bobb v. Woodward, 50 Mo. 95; Scriven v. Bostwick, 2 McCord Ch. 410; Bank v. Ballard, 12 Rich. 259; Gregg v. Bigham, 1 Hill (S. C.) 299.

[7] Ramsey v. Quillen, 5 Lea, 184; Porter v. Cocke, Peck, 30; Jones v. Read, 1 Humph. 335; Compton v. Perry, 23 Tex. 414; Reynolds v. Lans-

others, from the time of the levying of an execution on the property,[1] and in others from the time of a sale under an execution.[2] In some cases it has been held that the law on this point is affected by statutes regulating the remedies of the creditors. In one case where the law allowed a creditor to sue without obtaining judgment, it was held that the statute began to run from the time when the debt was due.[3] In another case where the law allowed a creditor to issue an attachment for fraud, it was held that the statute began to run from the time when he could have issued an attachment.[4] In another case where the right of a creditor was suspended by an appeal from his judgment, it was held that the statute did not begin to run until a judgment was rendered by an appellate tribunal.[5] When the property is such that it can not be taken on execution, the statute does not begin to run until after the recovery of a judgment and the return of an execution unsatisfied.[6] If the grantee is also administrator, he can not plead the statute of limitations.[7] As a purchaser at a sale under an execution succeeds to the rights of the execution creditor, his right to the property will be barred at the time when the right of the creditor would have been barred.[8]

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ford, 16 Tex. 286; Musselman v. Kent, 33 Ind. 452; Marr v. Rucker, 1 Humph. 348. In the last case it was held that the statute did not begin to run until a judgment was rendered in the State where the property was.

[1] Wilson v. Buchanan, 7 Gratt. 334; Dodd v. McCraw, 8 Ark. 83.

[2] Pickett v. Pickett, 3 Dev. 6; Hoke v. Henderson, 3 Dev. 12; Dobson v. Erwin, 4 Dev. & Bat. 201; 1 Dev. & Bat. 569; Beach v. Catlin, 4 Day, 284; Law v. Smith, 4 Ind. 56.

[3] Mulloy v. Paul, 2 Tenn. Ch. 156. [4] Rogers v. Brown, 61 Mo. 187.

[5] Martel v. Somers, 26 Tex. 551.

[6] Gates v. Andrews, 37 N. Y. 637; Eyre v. Beebe, 28 How. Pr. 333.

[7] Stephens v. Barnett, 7 Dana, 257.

[8] Porter v. Cocke, Peck, 30; Rogers v. Brown, 61 Mo. 187; *vide* Hager v. Shindler, 29 Cal. 47; Stewart v. Thompson, 32 Cal. 260. In Pickett v.

Limitations Run only from Discovery.—The statute of limitations is not obligatory upon a court of equity, and does not apply to proceedings in equity, except so far as the court deems it conducive to the ends of justice to apply it in analogy to the rules which prevail in a court of law. As the court only acts on this analogy because of its subserviency to the ends of justice, it does not follow the statute when such a course would be obviously subversive of justice. In equity therefore the statute does not commence to run until the discovery of the fraud.[1] Although a denial of notice of the fraud is a negative proposition, yet the complainant must aver it in his bill, and it is incumbent on him to offer some evidence in support of the averment to rebut the presumption arising from the lapse of time.[2] If no issue is made by the pleadings and no evidence is offered in regard to the time of the discovery, it will be deemed to have been made at the time of the transfer.[3]

Mere suspicion of fraud is not sufficient to allow the statute to begin to run. It is necessary to bring home to the creditor a knowledge of the facts constituting the fraud. The statute only begins to run from the time when a knowledge of the facts constituting the fraud, or the means by which a knowledge of those facts might by

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Pickett, 3 Dev. 6, it was held that the statute began to run as against a purchaser from the date of the sale although he did not obtain his deed until afterwards.

[1] McLure v. Ashby, 7 Rich. Eq. 430; Eigleberger v. Kibler, 1 Hill Ch. 113; Martin v. Smith, 1 Dillon, 85; s. c. 4 N. B. R. 275; Means v. Feaster, 4 Rich. (N. S.) 249; Wynne v. Cornelison, 52 Ind. 312; *vide* Rogers v. Brown, 61 Mo. 187.

[2] Erickson v. Quinn, 3 Lans. 299; s. c. 47 N. Y. 410; Carr v. Hilton, 1 Curt. 390, 230; Baldwin v. Martin, 35 N. Y. Sup. 85. *Contra*, McLure v. Ashby, 7 Rich. Eq. 430; Shannon v. White, 6 Rich. Eq. 96; Means v. Feaster, 4 Rich. (N. S.) 249.

[3] Bobb v. Woodward, 50 Mo. 95.

proper diligence have been obtained.[1] Positive information, however, is not required. The notice will be sufficient to prevent the suspension of the statute, if it be such as would put a reasonably diligent man upon the inquiry.[2] Nor must the aggrieved party wait until he has discovered evidence by which he may establish the fraud in a court of justice. If he has knowledge that a fraud has been committed, though that knowledge is confined to himself, he must proceed diligently, for the statute in such case will not be suspended.[3] If the conveyance is voluntary, knowledge by the creditor of the existence of the conveyance and of the indebtedness of the grantor without knowledge that the conveyance is voluntary and without consideration, can not be deemed knowledge of the facts constituting the fraud. Until he learns the fact last mentioned he can not be said to have discovered the fact constituting the fraud. Although the main question of fact upon which the invalidity of the conveyance depends is the intent to defraud creditors, yet that intent is a mere conclusion or inference from other facts. The fundamental fact from which the conclusion of a fraudulent intent is drawn is the absence of any valuable consideration, and so long as the creditor is ignorant of that essential and controlling fact the statute ought not to run against him.[4] The ignorance of an executor will not prevent the running of the statute when the facts were known to the testator.[5] Independently of the

[1] Shannon v. White, 6 Rich. Eq. 96; Abbey v. Bank, 31 Miss. 434; Snodgrass v. Bank, 25 Ala. 161; Erickson v. Quinn, 47 N. Y. 410; s. c. 3 Lans. 299.

[2] Hathaway v. Noble, 55 N. H. 508; Carr v. Hilton, 1 Curt. 230, 390; Martin v. Smith, 1 Dillon, 85; s. c. 4 N. B. R. 275.

[3] McLure v. Ashby, 7 Rich. Eq. 430; Wood v. Carpenter, 101 U. S. 135.

[4] Erickson v. Quinn, 47 N. Y. 410; s. c. 3 Lans. 299.

[5] Lott v. DeGraffenreid, 10 Rich. Eq. 346.

statute, delay alone may be sufficient to deprive the complainant of his right to recover.[1] If the original transfer has been rendered valid by the lapse of time, it can not be impeached collaterally by assailing a purchase made with the proceeds of the property.[2]

COMPLAINANT MUST HAVE SUPERIOR EQUITY.—A party in a court of equity who asks to have his own equitable rights enforced and a conveyance annulled which he insists is unconscionable and fraudulent, must by clear and indubitable evidence show that he has superior equity to all against whom he seeks relief. If he invokes the aid of a court of equity, he must not ask to have superior equity set aside to let him into the relief sought.[3]

THE DECREE.—If the special prayers for relief are inapt, the court, under the prayer for general relief, may grant any appropriate relief consistent with the case made by the bill.[4] No decree, however, can be founded upon evidence, and in relation to matters which are not put in issue between the parties. A creditor, therefore, can not impeach a transfer on a ground not taken in his bill,[5] or obtain a decree to affect a transfer which the bill does not allege to be fraudulent.[6] When there is no fraud in the transfer, the bill must be dismissed, although the consideration therefor is inadequate.[7] If the transfer is found

[1] Huston v. Cantril, 11 Leigh, 136. [2] Bobb v. Woodward, 50 Mo. 95.
[3] Bridgford v. Riddle, 55 Ill. 261; Preston v. Twiner, 36 Iowa, 671.
[4] Annin v. Annin, 24 N. J. Eq. 184.
[5] Roberts v. Gibson, 6 H. & J. 116; Tripp v. Vincent, 3 Barb. Ch. 613; Bailey v. Ryder, 10 N. Y. 363; Hovey v. Holcomb, 11 Ill. 660; Parkhurst v. McGraw, 24 Miss. 134; Nicholson v. Leavitt, 4 Sandf. 252; S. C. 6 N. Y. 510; 10 N. Y. 591; Myers v. Sheriff, 21 La. An. 172; Bachman v. Sepulveda, 39 Cal. 688; Ontario Bank v. Root, 3 Paige, 478.
[6] Wilson v. Horr, 15 Iowa, 489; Hunter v. Hunter, 10 W. Va. 321.
[7] Smith v. Pate, 3 Rich. (N. S.) 204.

to be void, the decree should not be a personal decree against the grantee for the debt,[1] or for the value of the property where that may still be reached by the creditors,[2] but should be a decree vacating the transfer. If a decree is made for a sale, it may be made without ordering any conveyance to be made by either the debtor or the grantee.[3] When the transfer is annulled, the court may leave the creditor to enforce his execution at law, when the property can be so reached, or, having assumed jurisdiction of the cause and subject matter, may proceed to do full and complete justice by directing a sale of the property.[4] If the property was purchased in part with the debtor's money and conveyed to another, the conveyance may be allowed to stand upon the payment of the amount so used.[5] If the property in such case has depreciated, the loss arising from a depreciation may be apportioned according to the respective sums invested by the debtor and purchaser.[6] Where the bill is filled by a purchaser under an execution, a decree setting aside the conveyance is sufficient[7] The decree may, however, not merely divest the title of the defendant, but may proceed to vest that title in the complainant.[8] It has, however,

[1] Patterson v. McKinney, 97 Ill. 41.

[2] Phipps v. Sedgwick, 95 U. S. 3; s. c. 12 Blatch. 163; s. c. 5 Ben. 184; s. c. 5 N. B. R. 168; s. c. 10 N. B. R. 28.

[3] Cole v. Tyler, 65 N. Y. 73. *Contra*, Van Wyck v. Baker, 17 N. Y. Supr. 39.

[4] Scouton v. Bender, 3 How. Pr. 185; Yoder v. Standiford, 7 Mon. 478; Planters' Bank v. Walker, 7 Ala. 926; Hunt v. Knox, 34 Miss. 655; Chatauqua Bank v. White, 6 N. Y. 236; s. c. 6 Barb. 589; McCalmont v. Lawrence, 1 Blatch. 232; *vide* Higgins v. York Building Co., 2 Atk. 107; Hendrickson v. Winne, 3 How. Pr. 127.

[5] Oliver v. Moore, 26 Ohio St. 298.

[6] Shaeffer v. Fithian, 26 Ohio St. 282.

[7] Hagar v. Shindler, 29 Cal. 47.

[8] Ames v. Gilmore, 59 Mo. 537; Kenealy v. Macklin, 2 Mo. Ap. 241.

been held that if the execution creditor was the purchaser, the purchase might be disregarded and the property sold to satisfy the judgment.[1] A provision in the decree that the defendant shall release to the complainant merely quiets the title, but does not confer an independent, substantial title under the defendant, so as to bar a claim of dower.[2] Although a decree declares a deed void as to creditors, yet if their debts are paid the decree is satisfied and is no longer of any effect.[3] If the decree directs a sale of the property, a purchaser obtains a good title although the grantee dies after the decree but before the sale, for he connects his title with that held by the debtor before the fraudulent conveyance was made, and the decree binds the grantee and his heirs and representatives.[4] When a creditor brings a suit to procure a satisfaction of his own claim only, the action ends as soon as he is satisfied, and no decree can be made affecting any surplus that may remain in the grantee's hands.[5]

How far Judgment conclusive.—Although an assignee of the grantee recovers a judgment in action concerning the property against the grantor and grantee, yet it is not conclusive against a creditor of the grantor.[6] A decree is conclusive as against the parties to the suit in all subsequent actions relating to the same subject matter whether it annuls[7] or establishes[8] the conveyance. A

[1] Apperson v. Burgett, 33 Ark. 328; Bennett v. Hutson, 33 Ark. 762.

[2] Woodworth v. Paige, 5 Ohio St. 70.

[3] Rawson v. Fox, 65 Ill. 200. [4] Beaumont v. Fletcher, 24 Ohio St. 445.

[5] Ward v. Enders, 20 Ill. 519; Ballentine v. Beall, 4 Ill. 203; Kaupe v. Bridge, 2 Robt. 459; Bostwick v. Menck, 40 N. Y. 383; Kerr v. Hutchins, 46 Tex. 384.

[6] Raymond v. Richmond, 78 N. Y. 351.

[7] *In re* Hussman, 2 N. B. R. 437.

[8] *In re* James S. Antisdel, 18 N. B. R. 289; Downer v. Powell, 25 Vt. 336.

creditor against whom a judgment has been rendered in an action instituted by him to set aside the conveyance can not intervene in a subsequent action instituted by another creditor as to the claim in controversy in the prior suit, but may as to a claim not then in controversy.[1] But a decree in an action between a creditor and the debtor is not conclusive in a subsequent suit between the assignee in bankruptcy of the debtor and the grantee.[2] A decree between the assignee in bankruptcy of the debtor and the grantee is not conclusive in a subsequent action between a judgment creditor whose judgment is a lien on the property and the grantee.[3] A judgment in an action of ejectment by the grantee against an executor of the grantor is not a bar to a subsequent action by a creditor to vacate the conveyance if the executor did not set up the fraud, although an executor can impeach a fraudulent conveyance.[4]

DISTRIBUTION.—If several creditors are parties to the proceedings, the proceeds will be distributed according to the priorities of the various parties, for the funds remain subject to the same liens as the property before the sale.[5] The decree virtually and necessarily establishes the claims of all the originally suing creditors, unless some of them are especially excepted by the decree itself. But such decree only establishes the claim as a debt due from the debtor, without prejudice to third persons; and consequently, if any others who have been allowed to come in as parties to the suit can show fraud, or any other circumstance by which it appears that the debt so established

[1] O'Brien v. Browning, 18 N. Y. Supr. 179.
[2] Bradley v. Hunter, 50 Ala. 265. [3] Fisher v. Lewis, 69 Mo. 629.
[4] Hills v. Sherwood, 48 Cal. 386. [5] Codwise v. Gelston, 10 Johns. 507.

ought not be permitted to stand in the way of their interests, it may be then shown.[1]

Creditors at Large.—Upon a bill filed by simple contract creditors, a distribution is made ratably among all the creditors, preserving, however, the rights of those who have liens upon the property.[2]

Liens.—The filing of a bill by a judgment creditor and the service of process create a lien in equity upon the effects of the debtor. This has been aptly termed an equitable levy.[3] To constitute a lien, the bill must be filed against the grantee and not against the debtor alone.[4] The filing of the bill must also be followed up by service of process.[5] If creditors file separate bills, they are entitled to priority of payment in the order in which they commence their suits.[6] When the property can not be

[1] Rhodes v. Amsinck, 38 Md. 345.

[2] Day v. Washburn, 24 How. 352; Robinson v. Stewart, 10 N. Y. 189; Barton v. Bryant, 2 Ind. 189; McNaughton v. Lamb, 2 Ind. 642; *vide* Wallace v. Treakle, 27 Gratt. 479.

[3] Chittenden v. Brewster, 2 Wall. 191; Hartshorne v. Eames, 31 Me. 93; Newell v. Morgan, 2 Harring. 225; 2 Del. Ch. 20; Newdigate v. Lee, 9 Dana, 17; Bank v. Burke, 4 Blackf. 141; Ballentine v. Beall, 4 Ill. 203; Spader v. Davis, 5 Johns. Ch. 280; Albany Bank v. Schermerhorn, 1 Clarke Ch. 297; Jeffries v. Cochrane, 47 Barb. 557; Cummings v. McCullough, 5 Ala. 324; Moffat v. Ingham, 7 Dana, 495; Barrett v. Read, Wright, 700; Peacock v. Tompkins, Meigs, 317; Gracey v. Davis, 3 Strobh. Eq. 55; Stanton v. Keyes, 14 Ohio St. 443; Maiders v. Culver, 1 Duvall, 164; Crawford v. Kirksey, 55 Ala. 282; Young v. Gillespie, 12 Heisk. 239; Cole v. Marple, 98 Ill. 58; Brooks v. Gibson, 7 Lea, 271; Clark v. Brockway, 1 Abb. Ap. 352; *vide* Peacock v. Tompkins, Meigs, 317; Chase v. Searles, 45 N. H. 511.

[4] Fields v. Sands, 8 Bosw. 685; Conger v. Sands, 19 How. Pr. 8; Miller v. Sherry, 2 Wall. 237.

[5] Boynton v. Rawson, 1 Clarke, 584; Herrington v. Herrington, 27 Mo. 560.

[6] Hone v. Henriquez, 13 Wend. 240; s. c. 2 Edw. 120; Moffat v. Ingham, 7 Dana, 495; Fields v. Sands, 8 Bosw. 685; Boynton v. Rawson, 1 Clarke, 584.

taken on execution, it is not the return of an execution unsatisfied, but the filing of a bill that gives a lien. If the party whose execution is first returned unsatisfied delays, a subsequent execution will gain a preference by superior vigilance in filing a bill.[1] The filing of a bill will also give a prior lien upon the personal estate of the debtor when there has not been an actual levy. The lien is created by the issuing of the execution, and the filing of the bill gives it a priority.[2]

Priority of Liens.—The equitable lien created by the filing of a bill is subject to any valid lien which may happen to exist in favor of any other creditor at the time of the service of the process.[3] But the lien of a judgment on real estate previously conveyed by the debtor is merely a *quasi* lien and liable to be divested by subsequent equities. Consequently if a junior judgment creditor files a bill to set aside the conveyance, he obtains a right to priority over the lien of a senior judgment as a reward for his diligence.[4] If the senior judgment creditor issues an execution after the service of process under the bill, a purchaser at a sale under the execution will take the property subject to the equitable lien created by the filing of the bill, for he stands in no better attitude than any other

[1] Weed v. Pierce, 9 Cow. 722; Edmeston v. Lyde, 1 Paige, 637; Beck v. Burdett, 1 Paige, 305; Grover v. Wakeman, 4 Paige, 23; s. c. 11 Wend. 187.

[2] Scouton v. Bender, 3 How. Pr. 185; Weed v. Pierce, 9 Cow. 722; Albany Bank v. Schermerhorn, Clarke Ch. 297; Warden v. Browning, 19 N. Y. Supr. 497.

[3] Lane v. Lutz, 1 Keyes, 203; s. c. 3 Abb. Ap. 19; Scouton v. Bender, 3 How. Pr. 185; Haleys v. Williams, 1 Leigh, 140.

[4] Lyon v. Robbins, 46 Ill. 276; Rappelley v. International Bank, 93 Ill. 396; Wood v. Wright, 4 Fed. Rep. 511; Burt v. Keyes, 1 Flippin, 61; Miller v. Sherry, 2 Wall. 237. *Contra*, Scouton v. Bender, 3 How. Pr. 185; Hubbs v. Bancroft, 4 Ind. 388.

purchaser *pendente lite*.[1] This principle appears to be as applicable to personal property as to real estate, but the authorities are the other way.[2] If the grantee while the bill is pending reconveys the land to the debtor, who immediately mortgages it to another creditor, the creditor who files the bill is entitled to priority over the mortgagee.[3] Creditors who obtain judgments while the bill is pending are entitled to be paid according to the lien of their respective judgments.[4] A purchaser at a sale by a trustee appointed under the bill acquires all the rights of the parties to the suit, and therefore has a title superior to that of a subsequent purchaser at a sale under an execution issued upon a judgment rendered before the filing of the bill.[5]

Costs.—Costs are peculiarly within the discretion of the court. They are usually allowed to the successful party.[6] In cases of constructive fraud they may be paid out of the fund.[7] When the transaction is such as would naturally induce a creditor to call for an explanation, the bill may be dismissed without costs if he is unsuccessful.[8]

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[1] Scott v. Coleman, 5 Mon. 73; Dargan v. Waring, 11 Ala. 988; Crawford v. Kirksey, 55 Ala. 282. *Contra*, Watson v. New York Central R. R. Co., 6 Abb. Pr. (N. S.) 91.

[2] Davenport v. Kelly, 42 N. Y. 193; Storm v. Waddell, 2 Sandf. Ch. 494; Lansing v. Eaton, 7 Paige, 364.

[3] Scott v. McMillen, 1 Litt. 302.

[4] Haleys v. Williams, 1 Leigh, 140.

[5] Scott v. Coleman, 5 Mon. 73; Miller v. Sherry, 2 Wall, 237; Dargan v. Waring, 11 Ala. 988. *Contra*, Chautauqua County Bank v. Risley, 19 N. Y. 369.

[6] Webb v. Daggett, 2 Barb. 9; How v. Camp, Walk. Ch. 427.

[7] Grover v. Wakeman, 11 Wend. 187; s. c. 4 Paige, 23; Saunders v. Turbeville, 2 Humph. 272; Fiedler v. Day, 2 Sandf. 594; Erickson v. Quinn, 47 N. Y. 410; s. c. 3 Lans. 299.

[8] White v. Sansom, 3 Atk. 410; Houghton v. Tate, 3 Y. & J. 486; Holmes v. Penney, 3 K. & J. 90; Townsend v. Westacott, 4 Beav. 58;

If the case is one of peculiar hardship to the creditor,[1] or if the conduct of the defendant does not meet with the approbation of the court,[2] each party may be directed to pay his own costs. A purchaser who has failed mainly through a defect in his answer, may be ordered to pay his own costs alone.[3] The costs of a person who is a necessary party may be allowed out of the fund when he has been guilty of no fraud.[4] If the conveyance was voluntary the costs may be paid out of the fund, if the donee did not know of the indebtedness and was not intentionally a party to the fraud.[5] Except in case of a gross abuse of the trust, an assignee claiming under a voluntary assignment is not usually charged with costs.[6] In the case of a creditor's bill, the counsel fees for the complainant's solicitor may be allowed out of the fund.[7]

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s. c. 9 L. J. Ch. 241; 2 Beav. 340; Hale v. Saloon Omnibus Co., 4 Drew, 492; s. c. 28 L. J. Ch. 777; Magawley's Trust, 5 De G. & S. 1; McArthur v. Hoysradt, 11 Paige, 495; Jacks v. Tunno, 3 Dessau, 1; Cunningham v. Freeborn, 11 Wend. 241; s. c. 1 Edw. 256; 3 Paige, 537; Stern v. Fisher, 32 Barb. 198; Cox v. Platt, 32 Barb. 126; s. c. 19 How. Pr. 121; Niolon v. Douglass, 2 Hill Ch. 443; Pomeroy v. Manin, 2 Paine, 476; Webb v. Daggett, 2 Barb. 9; Wakefield v. Gibbon, 1 Giff. 401; Kent v. Riley, L. R. 14 Eq. 191.

[1] Hickman v. Quinn, 6 Yerg. 96.

[2] Clark v. Bailey, 2 Strobh. Eq. 143; Miller v. Halsey, 4 Abb. Pr. (N. S.) 28.

[3] Byers v. Fowler, 12 Ark. 218.

[4] Norcut v. Dodd, 1 Cr. & Ph. 100; Townsend v. Westacott, 4 Beav. 58; s. c. 9 L. J. Ch. 241; 2 Beav. 340.

[5] Erickson v. Quinn, 47 N. Y. 410; s. c. 3 Lans. 299.

[6] Webb v. Daggett, 2 Barb. 9.

[7] Strike v. M'Donald, 2 H. & G. 191; s. c. 1 Bland, 57; Goldsmith v. Russell, 5 De G. & M. 547.

CHAPTER XXIII.

EVIDENCE.

PROOF OF INDEBTEDNESS.—Before any person can assail a transfer as fraudulent he must show either that he is a creditor of the grantor or represents creditors.[1] For the purpose of establishing such indebtedness, the admissions of the grantor made prior to the transfer at a time when he had no interest to make false admissions, are competent evidence against him and all who claim under him either mediately or immediately by a subsequent title.[2] His declarations,[3] notes,[4] and accounts,[5] are *prima facie* evidence of the existence of the debts they respectively purport to represent. But admissions made after the transfer are not competent evidence.[6]

JUDGMENTS.—The record of a judgment rendered against the debtor is competent evidence against the

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[1] Garnons v. Knight, 5 B. & C. 671; Candler v. Fisher, 11 Md. 332; Mahany v. Lazier, 16 Md. 69; Conillard v. Duncan, 88 Mass. 440. Stanbro v. Hopkins, 28 Barb. 265; Ingram v. Phillips, 3 Strobh. Ch. 565; Cook v. Hopper, 23 Mich. 511; Mean v. Hicks, 65 Ala. 241.

[2] Richards v. Swan, 7 Gill. 366; s. c. 2 Md. Ch. 111; Gamble v. Johnson, 9 Mo. 605; High v. Nelms, 14 Ala. 350; Satterwhite v. Hicks, Busbee, 105; Hale v. Smith, 6 Me. 416; Dubose v. Young, 14 Ala. 139; Goodgame v. Cole, 12 Ala. 77.

[3] Ragan v. Kennedy, 1 Tenn. 91; Satterwhite v. Hicks, Busbee, 105; Dwight v. Brown, 9 Conn. 83.

[4] High v. Nelms, 14 Ala. 350; Foster v. Wallace, 2 Mo. 231; Feagan v. Cureton, 19 Geo. 404.

[5] Richards v. Swan, 7 Gill. 366; s. c. 2 Md. Ch. 111.

[6] Redfield v. Buck, 35 Conn. 328; Hitt v. Ormsbee, 12 Ill. 166; Townsend v. Westacott, 2 Beav. 340; s. c. 9 L. J. Ch. 241; 4 Beav. 58.

grantee to establish the existence of the debt. It is not competent evidence against third parties of the facts upon which the judgment is founded, but is evidence of the existence of the judgment itself, and is also *prima facie* evidence of the existence of the indebtedness.[1] There is a distinction between a mere admission of the debtor and a judgment, for the record of a judgment rendered after the transfer is sufficient evidence of the debt.[2] A judgment rendered against the debtor's administrator, whether domestic[3] or foreign,[4] is not competent evidence against the grantee. If a judgment is by confession the creditor must prove it to be for a just debt.[5] In this respect there is a distinction between a judgment obtained in due course of law and a judgment obtained by the consent of the debtor. The law presumes the former to be founded upon a valuable consideration and rendered for a just debt, but indulges no such presumption in favor of the latter. A copy of a judgment, however, as against third parties is merely evidence that the judgment has been rendered and

[1] Railroad Co. v. Kyle, 5 Bosw. 587; Law v. Payson, 32 Me. 521; Garrigues v. Harris, 17 Penn. 344; Garland v. Rives, 4 Rand. 282; Feagan v. Cureton, 19 Geo. 404; Vogt v. Ticknor, 48 N. H. 242; Easley v. Dye, 14 Ala. 158; Clayton v. Brown, 30 Geo. 490; Snodgrass v. Bank, 25 Ala. 161; Reed v. Davis, 22 Mass. 388; Prescott v. Hayes, 43 N. H. 593; Tappan v. Nutting, Brayt. 137; Hinde v. Longworth, 11 Wheat. 199; Goodnow v. Smith, 97 Mass. 69; Clark v. Anthony, 31 Ark. 546.

[2] Young v. Pate, 4 Yerg. 164; Vogt v. Ticknor, 48 N. H. 242; Railroad Co. v. Kyle, 5 Bosw. 587; Jenness v. Berry, 17 N. H. 549; Garland v. Rives, 4 Rand. 282.

[3] McDowell v. Goldsmith, 24 Md. 214; s. c. 6 Md. 219; s. c. 2 Md. Ch. 370; Baker v. Welch, 4 Mo. 484; Osgood v. Manhattan Co., 3 Cow. 612; Hills v. Sherwood, 48 Cal. 386. *Contra*, M'Laughlin v. Bank of Potomac, 7 How. 220; Chamberlayne v. Temple, 2 Rand. 384.

[4] King v. Clarke, 2 Hill Ch. 611.

[5] Sanders v. ———, Holt, 327; s. c. Skinner, 586; Botts v. Cozine, Hoff. Ch. 79; Brandt v. Stevenson, 3 Phila. 205; *vide* Woodworth v. Woodworth, 21 Barb. 343.

of the time of its rendition, but it does not operate as proof of the time when the debt originated for which the judgment was rendered.[1]

JUDGMENT NOT CONCLUSIVE.—A judgment may be impeached collaterally by proof that the court rendering it had no jurisdiction, or that it was obtained by fraud or collusion,[2] or that it was entered illegally,[3] but not beyond this; and where a judgment in a personal action is not liable to either of these objections, whether rendered upon default or by confession or after contestation, it is conclusive evidence to establish both the relation of debtor and creditor between the parties to the record and the amount of the indebtedness, and can not be collaterally impeached in another suit where such relation and indebtedness are called in question.[4] It can not be impeached collaterally for mere irregularities,[5] or upon the ground that the action should have been brought by another party.[6] The grantee may, however, inquire into the grounds of a judgment and show that it does not give the party who holds it a right as against him to impeach the transfer.[7] He may show

[1] Donley v. McKiernan, 62 Ala. 34; Snodgrass v. Bank, 25 Ala. 161.

[2] Jenness v. Berry, 17 N. H. 549; Prescott v. Hayes, 43 N. H. 593; Miller v. Miller, 23 Me. 22; Law v. Payson, 32 Me. 521; Garland v. Rives, 4 Rand. 282; Church v. Chapin, 35 Vt. 223; Reed v. Davis, 22 Mass. 388; Caswell v. Caswell, 28 Me. 232; Esty v. Long, 41 N. H. 103; Ingals v. Brooks, 29 Vt. 398; Posten v. Posten, 4 Whart. 27.

[3] Caswell v. Caswell, 28 Me. 232; Carter v. Bennett, 4 Fla. 283.

[4] Sidensparker v. Sidensparker, 52 Me. 481; Ferguson v. Kumler, 11 Minn. 104; Candee v. Lord, 2 N. Y. 269; Starr v. Starr, 1 Ohio, 321; Swihart v. Shaum, 24 Ohio St. 432; Scott v. Ind. Wagon Works, 48 Ind. 75; Cock v. Oakley, 50 Miss. 628; Pickett v. Pipkin, 64 Ala. 520.

[5] Carter v. Baker, 10 Heisk. 640.

[6] Clark v. Anthony, 31 Ark. 546.

[7] Miller v. Miller, 23 Me. 22; Miller v. Johnson, 27 Md. 6; Mattingly v. Nye, 8 Wall. 370; Boutwell v. McClure, 30 Vt. 674.

that it was without consideration,[1] or that the debt[2] for which it was rendered or the judgment itself[3] has been paid, or that there were mutual claims which could have been made the subject of a set-off and by this means be mutually cancelled,[4] or that the debt was really contracted by the debtor as agent for another,[5] or that the judgment is being used for the benefit of the debtor,[6] or that the judgment is for a debt created after the transfer.[7] The right to inquire into the grounds of the judgment, however, does not extend so far as to give him the right to retry an issue which has been litigated and determined between the parties in accordance with the forms and principles of law without fraud or collusion,[8] especially if the action was for slander, trespass, malicious prosecution, or a similar tort.[9] How far he may set up defenses which the debtor omitted to make is a question that can not be considered as settled. It has been held that he may show that the debtor was a minor,[10] or that the debt was barred

[1] Jenness v. Berry, 17 N. H. 549; Prescott v. Hayes, 43 N. H. 593; Boutwell v. McClure, 30 Vt. 674; Sargent v. Salmond, 27 Me. 539; Garland v. Rives, 4 Rand. 282; Church v. Chapin, 35 Vt. 223; Reed v. Davis, 22 Mass. 388; Posten v. Posten, 4 Whart. 27; Hall v. Hamlin, 2 Watts, 354; King v. Tharp, 26 Iowa, 283; Miller v. Johnson, 27 Md. 6.

[2] Mattingly v. Nye, 8 Wall. 370; Reed v. Davis, 22 Mass. 388; Ingalls v. Brooks, 29 Vt. 398.

[3] Boutwell v. McClure, 30 Vt. 674.

[4] Warner v. Percy, 22 Vt. 155; Hall v. Hamlin, 2 Watts, 354.

[5] Teed v. Valentine, 65 N. Y. 471.

[6] Feagan v. Cureton, 19 Geo. 404; Boutwell v. McClure, 30 Vt. 674; Esty v. Long, 41 N. H. 103.

[7] Miller v. Miller, 23 Me. 22; Miller v. Johnson, 27 Md. 6; Mattingly v. Nye, 8 Wall. 370.

[8] Jenness v. Berry, 17 N. H. 549; Garland v. Rives, 4 Rand. 282; Church v. Chapin, 35 Vt. 223; Candee v. Lord, 2 N. Y. 269; Ferguson v. Kumler, 11 Minn. 104; Sidensparker v. Sidensparker, 52 Me. 481.

[9] Sidensparker v. Sidensparker, 52 Me. 481.

[10] Edmunds v. Mister, 58 Miss. 765.

by the statute of limitations before the commencement of the suit in which the judgment was rendered,[1] or that the debt arose out of a contract which was void as against public policy,[2] or that the contract was void on account of usury.[3] On the other hand, it has been held that he could not show that the note on which the judgment was rendered was made on Sunday.[4]

LIMITED TO PLEADINGS.—Evidence to establish the fraud must be confined to the pleadings, for the facts which the pleadings admit can not be varied or contradicted. The only purpose of evidence is to establish what is alleged by one party and denied by the other.[5] To establish the controverted facts, proof is the end and evidence is the means. Proof establishes the truth. Evidence only tends towards it. Any pertinent and legitimate facts conducing to the proof of a litigated fact are evidence of it, either weaker or stronger, according to their entire character and complexion.[6] Evidence which tends to prove an issue contributes to its establishment and assists in giving a leaning to the mind in its consideration or determination. That which is directed to an end, however, may not necessarily attain it. It may be received as evidence if it has this tendency, but it is not to be treated as conclusive or as necessarily warranting the fact which it tends to establish. Evidence, however, may

[1] Warner v. Dove, 33 Md. 579; McDowell v. Goldsmith, 24 Md. 214; s. c. 2 Md. Ch. 370; s. c. 6 Md. 319. *Contra*, Clark v. Anthony, 31 Ark. 546.

[2] Bruggerman v. Hoerr, 7 Minn. 337.

[3] Taylor v. Eubanks, 3 A. K. Marsh. 239. *Contra*, Hislop v. Hoover, 68 N. C. 141.

[4] Jenness v. Berry, 17 N. H. 549.

[5] Parkhurst v. McGraw, 24 Miss. 134.

[6] Miles v. Edelen, 1 Duvall, 270.

be so direct and positive as to amount to proof itself, but in general it consists of facts which, while they do not necessarily establish the controverted fact, tend to justify the inference of its existence.[1]

ADMISSIBILITY.—In questions of fraud a wide range of evidence is allowed.[2] Fraud assumes many shapes, disguises and subterfuges, and is generally so secretly hatched that it can only be detected by a consideration of facts and circumstances which are not unfrequently trivial, remote, and disconnected. To interpret their meaning, or the full meaning of any one of them, it may be necessary to bring them together and contemplate them all in one view. In order to do this it is necessary to pick up one here and another there until the collection is complete. A wide latitude of evidence is therefore allowed in order that fraud may be detected and exposed. This principle arises from necessity and is established for the protection of society and the benefit of morals. Each detached piece of evidence is not therefore to be rejected as it is offered, because it is apparently trivial.[3] Any fact however slight, if at all relevant to the issue, is admissible.[4] It is not easy to draw the precise line separating those circumstances which are fairly admissible from those which ought to be excluded. The true test is whether the evidence can throw light upon the transaction or is altogether irrelevant.[5] The relevancy of a given fact, however, does

[1] Davenport v. Cummings, 15 Iowa, 219.

[2] Covanhovan v. Hart, 21 Penn. 495; Garrigues v. Harris, 17 Penn. 344; Ferris v. Irons, 83 Penn. 179.

[3] Blue v. Penniston, 27 Mo. 272.

[4] Waters v. Dashiell, 1 Md. 455; Curtis v. Moore, 20 Md. 93; Balto. & Ohio R. R. Co. v. Hoge, 34 Penn. 214.

[5] Zerbe v. Miller, 16 Penn. 488; Heath v. Page, 63 Penn. 280; Blue v. Penniston, 27 Mo. 272; Wright v. Linn, 16 Tex. 34; Cooke v. Cooke, 43 Md. 522.

not depend upon its force but upon its bearing. If it bears either directly or indirectly with any weight whatever on the main controversy, or any material part of it, it is admissible.[1] Evidence which has no connection with the matters in issue, but merely tends to create a personal prejudice against one of the parties, should be excluded.[2] So also if the whole evidence taken together would merely raise a suspicion, it may be rejected.[3]

Evidence of Secret Trust.—Sometimes the proof of the fraudulent intent depends upon the establishment of a secret trust between the parties, and in all cases when a fraud is established the grantee is treated as a trustee for the creditors. Such a trust, however, is not a trust between the parties to the transaction to be set up and enforced by the *cestui que trust* or his representatives. It is a question of fraud by reason of a secret trust with fraudulent intent as affecting the validity of the transfer. Hence the doctrines of the law as to the proof of a trust, whether it may be by parol or must be by writing, are not involved. The question is one of fraudulent intent, and such intent may be proved by any kind of evidence by which fraud may be proved.[4]

Res Gestæ.—In questions of fraud or *bona fides* an adequate judgment can in general only be formed by having a perfect view of the whole transaction, and this includes the conversation which forms a part of it. The

[1] King v. Poole, 61 Geo. 373.

[2] Carr v. Gale, Davies, 328; Davenport v. Wright, 51 Penn. 292.

[3] Boylston v. Carver, 11 Mass. 515.

[4] McLane v. Johnson, 43 Vt. 48; Starr v. Starr, 1 Ohio, 321; Hills v. Eliot, 12 Mass. 26; Blair v. Alston, 26 Ark. 41; Rice v. Cunningham, 116 Mass. 466; Robinson v. Bliss, 121 Mass. 428.

language which is used on any occasion forms a part of the *res gestæ*. The declarations and acts of the debtor made before the transfer and contemporaneous with it are admissible.[1] They are admissible in evidence in favor of the grantee,[2] as well as of creditors. The acts[3] and declarations of the grantee[4] which accompany the transfer stand on the same footing as those of the debtor. So far as the acts and declarations of the parties form a part of and assist in giving character to the transaction, they constitute a part of the *res gestæ* and are competent evidence.[5] When admitted they do not conclusively establish the fraud, but are to be considered in connection with other evidence, and to be governed as to their effect by the usual rules of the law.[6] The declarations of an agent when they constitute a part of the *res gestæ* are also competent evidence.[7]

[1] McDowell v. Goldsmith, 6 Md. 319; s. c. 2 Md. Ch. 370; s. c. 24 Md. 214; Waters v. Riggin, 19 Md. 536; Badger v. Story, 16 N. H. 168; Angier v. Ash, 26 N. H. 99; Goodgame v. Cole, 12 Ala. 77; Elliott v. Stoddard, 98 Mass. 145; Sackett v. Spencer, 65 Penn. 89; York County Bank v. Carter, 38 Penn. 446; Merrill v. Meachum, 5 Day, 341; Cook v. Swan, 5 Conn. 140; Crary v. Sprague, 12 Wend. 41; Gamble v. Johnson, 9 Mo. 605; Hardee v. Langford, 6 Fla. 13; Potter v. McDowell, 31 Mo. 62; Marsh v. Davis, 24 Vt. 363; Hoose v. Robbins, 18 La. An. 648; Heath v. Page, 63 Penn. 280; Weil v. Silverstone, 6 Bush, 698; Peck v. Crouse, 46 Barb. 151; McLane v. Johnson, 43 Vt. 48; Pomeroy v. Bailey, 43 N. H. 118; Wilson v. Forsyth, 24 Barb. 105; M'Kinney v. Rhoads, 5 Watts, 343; Wykoff v. Carr, 8 Mich. 44; Bates v. Ableman, 13 Wis. 644; Rea v. Missouri, 17 Wall. 532; Walrath v. Campbell, 28 Mich. 111; Pearson v. Forsyth, 61 Geo. 537; *vide* Alexander v. Gould, 1 Mass. 165; Reichart v. Castator, 5 Binn. 109.

[2] Elliott v. Stoddard, 98 Mass. 145; Sackett v. Spencer, 65 Penn. 89; Sweetzer v. Mead, 5 Mich. 107; *vide* Gruber v. Boyles, 1 Brev. 266; U. S. v. Mertz, 2 Watts, 406; College v. Powell, 12 Gratt. 372.

[3] Cuyler v. McCartney, 40 N. Y. 221; s. c. 33 Barb. 165.

[4] Boyden v. Moore, 28 Mass. 362.

[5] Claytor v. Anthony, 6 Rand. 285; Penn v. Scholey, 3 Esp. 243.

[6] McDowell v. Goldsmith, 6 Md. 319; s. c. 2 Md. Ch. 370; s. c. 24 Md. 214.

[7] Henschen v. Leichtemeyer, 49 Mo. 51; Kelly v. Campbell, 38 N. Y. (Keyes) 29.

Prior Acts and Declarations.—In order to invalidate a transfer for a valuable consideration, it must be shown that it was made with a fraudulent intent on the part of the debtor, and that the grantee had notice of this intent and participated in it. These propositions are, in some measure, independent of each other, inasmuch as there may be a fraudulent intent on the part of the debtor which may not be known to the grantee, though proof of both must concur to establish the right of a creditor to recover. The evidence to prove these several propositions may be of different kinds and drawn from different sources. It may apply separately to the two branches of the case. Evidence in regard to the conduct and declarations of the debtor prior to the transfer is admissible to prove the fraud on his part, and if this is proved, the knowledge of it on the part of the grantee may be proved by any circumstances tending to show a participation in the designs of the debtor. These acts and declarations may be proved without proving knowledge on the part of the grantee of the particular acts and declarations from which the fraudulent intent is to be inferred.[1] The com-

[1] Bridge v. Eggleston, 14 Mass. 245; Clarke v. Waite, 12 Mass. 439; Foster v. Hall, 29 Mass. 89; Blake v. White, 13 N. H. 267; Heath v. Page, 63 Penn. 280; Howe v. Reed, 12 Me. 515; Landecker v. Houghtaling, 7 Cal. 391; Mansir v. Crosby, 72 Mass. 334; Gillett v. Phelps, 12 Wis. 392; Davis v. Stern, 15 La. An. 177; Grooves v. Steele, 2 La. An. 480; Gray v. St. John, 25 Ill. 222; Winchester v. Charter, 97 Mass. 140; s. c. 102 Mass. 272; s. c. 94 Mass. 606; Sarle v. Arnold, 7 R. I. 582; Cook v. Moore, 65 Mass. 213; Kimmel v. M'Right, 2 Penn. 38; Farmers' Bank v. Douglass, 19 Miss. 469; Guidry v. Grivot, 2 Martin (N. S.) 13; Chase v. Walters, 28 Iowa, 460; Wright v. Linn, 16 Tex. 34; Lynde v. McGregor, 95 Mass. 172; McElfatrick v. Hicks, 21 Penn. 402; Booth v. Bunce, 33 N. Y. 139; s. c. 24 N. Y. 592; s. c. 35 Barb. 496; Trezevant v. Courtenay, 23 La. An. 628; Chase v. Chase, 105 Mass. 385; Hopkins v. Langton, 30 Wis. 379; Cooke v. Cooke, 43 Md. 522; Fullerton v. Viall, 42 How. Pr. 294; Bishoff v. Hartley, 9 W. Va. 100; Tyler v. An-

petency of such evidence does not depend upon the time when the act was done or the declaration was made. If the act or declaration is so connected with the main fact under consideration as to explain its character, further its object, or to form in conjunction with it one continuous transaction, the evidence is admissible without regard to the time when the act was done or the declaration was made.[1] But if the act or declaration was so long prior to the transaction in controversy that it does not tend to throw any light on it, the evidence is not admissible.[2]

OTHER FRAUDULENT TRANSFERS.—Evidence of other fraudulent transfers at or about the time of the transfer in controversy is also competent to prove the fraudulent intent of the debtor,[3] although the grantee had no knowledge of such transfers, for proof of one fraudulent transfer

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gevine, 15 Blatch. 536; Stewart v. Fenner, 81 Penn. 177; Stowell v. Hazelett, 66 N. Y. 635; Kurtz v. Miller, 26 Kans. 314. *Contra*, Beach v. Catlin, 4 Day, 284; Reed v. Smith, 14 Ala. 380; Oden v. Rippettoe, 4 Ala. 68; Partelo v. Harris, 26 Conn. 480; Pettibone v. Phelps, 13 Conn. 445; Jones v. Norris, 2 Ala. 526; Adams v. Foley, 4 Iowa, 44; Prior v. White, 12 Ill. 261; Curtis v. Moore, 20 Md. 93; Durkee v. Chambers, 57 Mo. 575.

[1] Cooke v. Cooke, 43 Md. 522. [2] Weaver v. Ashcroft, 50 Tex. 427.

[3] Livermore v. Northrop, 44 N. Y. 107; Crow v. Ruby, 5 Mo. 484; Cummings v. McCullough, 5 Ala. 324; Cram v. Mitchell, 1 Sandf. Ch. 251; Guerin v. Hunt, 6 Minn. 375; S. C. 8 Minn. 477; Lehmer v. Herr, 1 Duvall, 360; Blake v. White, 13 N. H. 267; Hills v. Hoitt, 18 N. H. 603; Whittier v. Varney, 10 N. H. 291; Van Kirk v. Wilds, 11 Barb. 520; Angrave v. Stone, 45 Barb. 35; Benning v. Nelson, 23 Ala. 801; Fisher v. True, 38 Me. 534; Howe v. Reed, 12 Me. 515; Ford v. Williams, 3 B. Mon. 550; Zerbe v. Miller, 16 Penn. 488; Deakers v. Temple, 41 Penn. 234; Sarle v. Arnold, 7 R. I. 582; Warren v. Williams, 52 Me. 343; Taylor v. Robinson, 84 Mass. 562; Evans v. Matson, 56 Penn. 54; Thomas v. Beck, 39 Conn. 241; Stockwell v. Silloway, 113 Mass. 384; Cooke v. Cooke, 43 Md. 522; Summers v. Howland, 2 Baxter, 407; Prewitt v. Wilson, 103 U. S. 22; S. C. 3 Woods, 631; *vide* Brett v. Catlin, 57 Barb. 404; Mower v. Hanford, 6 Minn. 535; Christopher v. Covington, 2 B. Mon. 357.

tends to show that any other transfer made about the same time was made for the same purpose. There is, moreover, a probable connection in a series of sales nearly at the same time, the result of which is to strip a man of his available property. If such evidence were not admissible, it would be in the power of parties, by subdividing such transactions, to altogether destroy the force of the evidence resulting from their general character.[1] The rule that distinct frauds may be shown is limited, however, to such frauds as are contemporaneous, or at most nearly so, and does not embrace dealings which are so remote in point of time as to throw no light upon the matter in issue between the parties.[2] The admissibility of such evidence is to be determined according to the degree of its relation to the transfer in controversy. It need not take place immediately with it, provided it is calculated to unfold the nature and quality of the fact it is intended to explain, and so to harmonize with it as to constitute one transaction.

Declarations acted upon by Grantee.—Prior declarations which are subsequently adopted and acted upon by the grantee are competent evidence against him.[3]

Declarations of Conspirators.—When several persons are engaged in a common enterprise, each is responsible for the declarations as well as the acts of the others. If the connection and purpose are first established, the

[1] Pierce v. Hoffman 24 Vt. 525.

[2] Cohn v. Mulford, 15 Cal. 50; Staples v. Smith, 48 Me. 470; Huntzinger v. Harper, 44 Penn. 204; McAulay v. Earnhart, 1 Jones (N. C.) 502; Imray v. Magnay, 11 M. & W. 267; Flagg v. Willington, 6 Me. 386; Boyd v. Brown, 36 Mass. 453; Cook v. Swan, 5 Conn. 140; Blake v. Howard, 11 Me. 202.

[3] Cuyler v. McCartney, 40 N. Y. 221; s. c. 33 Barb. 165; Rea v. Missouri, 17 Wall. 532.

declarations of one of the parties, while engaged in the prosecution of this purpose, may be received against the others. They are admissible as a part of the *res gestæ*. They constitute parts of the transaction on which the rights of the creditors depend. The statements of a person who has participated in an act are not considered as mere hearsay, but as legitimate evidence of the act done,[1] and are thus competent evidence against the others.[2] It constitutes no objection to the admissibility of such declarations that the plan was concocted before the party against whom they are offered became an associate. By connecting himself with the others and aiding in the execution of their plan, he adopts their prior acts and declarations so far as they constitute a part of the *res gestæ*, as much as if he had been present and assented to each successive step in carrying out and consummating the fraud.[3]

Conspiracy must be Established.—Before such declarations can be given in evidence, however, there must be proof of the confederacy. In order to ascertain whether they are admissible, it devolves upon the court to determine for itself whether other facts are sufficiently proved,

[1] Stovall v. Farmers' Bank, 16 Miss. 305.

[2] Jenne v. Joslyn, 41 Vt. 478; McDowell v. Rissell, 37 Penn. 164; Lee v. Lamprey, 43 N. H. 13; M'Kee v. Gilchrist, 3 Watts, 230; Rogers v. Hall, 4 Watts, 359; Gibbs v. Neely, 7 Watts, 305; Trimble v. Turner, 21 Miss. 348; Tuttle v. Turner, 28 Tex. 759; Hartman v. Diller, 62 Penn. 37; Bredin v. Bredin, 3 Penn. 81; Kelsey v. Murphy, 26 Penn. 78; Stewart v. Johnson, 18 N. J. 87; Caldwell v. Williams, 1 Ind. 405; Cuyler v. McCartney, 40 N. Y. 221; s. c. 33 Barb. 165; Waterbury v. Sturtevant, 18 Wend. 353; Reitenbach v. Reitenbach, 1 Rawle, 362; Claytor v. Anthony, 6 Rand. 285; Abney v. Kingsland, 10 Ala. 355; Eaton v. Cooper, 29 Vt. 444; Borland v. Mayo, 8 Ala. 104; Stovall v. Farmers' Bank, 16 Miss. 305; Mamlock v. White, 20 Cal. 598; Tedrowe v. Esher, 56 Ind. 443; Sherman v. Hogland, 73 Ind. 472; Cordes v. Straszer, 8 Mo. Ap. 61.

[3] Stewart v. Johnson, 18 N. J. 87.

and whether these facts are *prima facie* sufficient proof that the parties have combined to effect the fraudulent design. If it finds that there is such proof, it admits the declarations as fit evidence to be considered by the jury in forming their judgment on the whole case, who may nevertheless negative the combination.[1] The combination can not be established by the declarations themselves, for a species of evidence which is in its nature inadmissible, unless some other fact is proved, can not be used to establish the fact the proof of which is an indispensable condition of its own admissibility. They therefore can not even be heard until a foundation is laid for their introduction, by proper proof that the debtor and grantee were engaged in a conspiracy to defraud creditors.[2] Mere proof that they have concurred in a transfer does not establish it, for it only shows a common intent, but not a common intent to defraud.[3] A very slight degree of concert or collusion, however, is sufficient.[4] The retention of the possession of personal property is sufficient[5] if it is of such a character as to raise a presumption of a fraudulent intent.[6] The retention of the possession of real estate is not sufficient.[7] A statement of the debtor showing a fraudulent intent made so near the grantee that he might, and most probably did, hear it is sufficient.[8] The rela-

[1] Claytor v. Anthony, 6 Rand. 285; Hathaway v. Brown, 18 Minn. 414; Boyd v. Jones, 60 Mo. 454.

[2] Cuyler v. McCartney, 40 N. Y. 221; s. c. 33 Barb. 165; Claytor v. Anthony, 6 Rand. 285; Abney v. Kingsland, 10 Ala. 355.

[3] Cuyler v. McCartney, 40 N. Y. 221; s. c. 33 Barb. 165.

[4] Hartman v. Diller, 62 Penn. 37; Crawford v. Ritter, 1 Penn. Supr. 29.

[5] Caldwell v. Williams, 1 Ind. 405; Borland v. Mayo, 8 Ala. 104; Waterbury v. Sturtevant, 18 Wend. 353.

[6] Abney v. Kingsland, 10 Ala. 355; Wright v. Cornelius, 10 Mo. 174.

[7] Tedrowe v. Esher, 56 Ind. 443.

[8] Stovall v. Farmers' Bank, 16 Miss. 305.

tion of husband and wife is not a sufficient foundation to make his acts or declarations competent evidence against her.[1] When the conspiracy is proved, a memorandum made by the debtor even after the death of the grantee is admissible in evidence.[2]

SUBSEQUENT DECLARATIONS.—The existence of the fraudulent intent must always be proved by evidence which is competent as against the grantee. The acts and declarations of the debtor, however, made after the transfer, have not, in the absence of any proof of a conspiracy, any tendency to prove the cause or motive of the act. After the transfer is consummated the debtor becomes a stranger to the title for all purposes, and his acts and declarations are no more binding on the grantee than are those of any stranger to the transaction. They are in their nature hearsay and irrelevant. No person, moreover, should be allowed to defeat his transfer by his own acts or words.[3] If the declarations or acts are made or

[1] Tripner v. Abrahams, 47 Penn. 220.

[2] Confer v. McNeal, 74 Penn. 112.

[3] Miner v. Phillips, 42 Ill. 128; Babb v. Clemson, 12 S. & R. 328; Clements v. Moore, 6 Wall. 299; Foster v. Wallace, 2 Mo. 231; Steward v. Thomas, 35 Mo. 202; Hessing v. McCloskey, 37 Ill. 341; Visher v. Webster, 13 Cal. 58; Lewis v. Wilcox, 6 Nev. 215; Peck v. Crouse, 46 Barb. 151; Vance v. Smith, 2 Heisk. 343; Ogden v. Peters, 15 Barb. 560; s. c. 21 N. Y. 23; Bogart v. Haight, 9 Paige, 297; Ball v. Loomis, 29 N. Y. 412; Savery v. Spaulding, 8 Iowa, 239; Norton v. Kearney, 10 Wis. 443; Myers v. Kenzie, 26 Ill. 36; Wynne v. Glidwell, 17 Ind. 446; Bates v. Ableman, 13 Wis. 644; Burt v. McKinstry, 4 Minn. 204; Pickett v. Pickett, 3 Dev. 6; Edgell v. Bennett, 7 Vt. 534; Gamble v. Johnson, 9 Mo. 605; Humphries v. McCraw, 9 Ark. 91; Scott v. Heilager, 14 Penn. 238; Reed v. Smith, 14 Ala. 380; Foote v. Cobb, 18 Ala. 585; Strong v. Brewer, 17 Ala. 706; McElfatrick v. Hicks, 21 Penn. 402; Wolf v. Carothers, 3 S. & R. 240; Gridley v. Bingham, 51 Ill. 153; Taylor v. Robinson, 84 Mass. 562; Derby v. Gallup, 5 Minn. 119; Lormore v. Campbell, 60 Barb. 62; Pier v. Duff, 63 Penn. 59; Sackett v. Spencer, 65

done with the assent of the grantee,[1] or if the debtor is produced as a witness,[2] then they may be used as evidence upon other grounds and not merely as intrinsically competent of themselves. If the debtor and grantee are both parties to the suit, the subsequent declarations of the debtor are competent evidence against him.[3]

Declarations in Possession.—When the debtor remains in possession of the property, his acts and declarations are competent evidence against the grantee. The possession is a part of the *res gestæ*, and the nature and character of the possession is an important point of inquiry. The acts and declarations connected with it and forming a part of its attendant circumstances are collateral indications of its nature, extent and purpose. They are admissible, not because any peculiar credit is due to the party in possession, but because they qualify and charac-

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Penn. 89; Cohn v. Mulford, 15 Cal. 50; Zimmerman v. Lamb, 7 Minn. 421; Winchester v. Charter, 97 Mass. 140; s. c. 102 Mass. 272; s. c. 94 Mass. 606; Aldrich v. Earle, 79 Mass. 578; Sutter v. Lackmann, 39 Mo. 91; Shaw v. Robertson, 12 Minn. 445; Kennedy v. Divine, 77 Ind. 490; Pulliam v. Newberry, 41 Ala. 168; Weinrich v. Porter, 47 Mo. 293; Ragan v. Kennedy, 1 Tenn. 91; Clark v. Johnson, 5 Day, 373; Phillips v. Eamer, 1 Esp. 355; Glenn v. Grover, 3 Md. 212; s. c. 3 Md. Ch. 29; Collumb v. Read, 24 N. Y. 505; Cuyler v. McCartney, 40 N. Y. 221; s. c. 33 Barb. 165; Bennett v. McGuire, 5 Lans. 183; s. c. 58 Barb. 625; Orr v. Gilmore, 7 Lans. 345; Hathaway v. Brown, 18 Minn. 414; Thornton v. Tandy, 39 Tex. 544; Holbrook v. Holbrook, 113 Mass. 74; Loughbridge v. Bowland, 52 Miss. 546; Garner v. Graves, 54 Ind. 188; Taylor v. Webb, 54 Miss. 36; Bennett v. Stout, 98 Ill. 47; City Nat'l Bank v. Hamilton, 34 N. J. Eq. 158.

[1] Kendall v. Hughes, 7 B. Mon. 368; Rea v. Missouri, 17 Wall. 532.

[2] Borland v. Mayo, 8 Ala. 104; Venable v. Bank, 2 Pet. 107; Knight v. Forward, 63 Barb. 311.

[3] Stowell v. Hazelett, 66 N. Y. 635; Hairgrove v. Millington, 8 Kans. 480; White v. Perry, 14 W. Va. 66.

terize the very fact to be investigated.[1] The principle applies to personal as well as real property,[2] and extends to the declarations of any person in possession.[3] The possession, however, must be actual, and not merely constructive and inconsistent with the title of the grantee.[4] The acts and declarations are admissible in favor of the grantee as well as of creditors.[5] But before they can be received, the possession must be shown to the satisfaction of the court.[6] They are not, moreover, admissible to every conceivable extent. As the ground of their admission is to explain the possession, they are limited to such as are ex-

[1] Askew v. Reynolds, 1 Dev. & Bat. 367; Marsh v. Hampton, 5 Jones (N. C.) 382; Goodgame v. Cole, 12 Ala. 77; Cole v. Varner, 31 Ala. 244; Pomeroy v. Bailey, 43 N. H. 118; Ragan v. Kennedy, 1 Tenn. 91; Peck v. Land, 2 Geo. 1; Paper Works v. Willett, 1 Robt. 131; Helfrich v. Stem, 17 Penn. 143; Carnahan v. Wood, 2 Swan, 500; Abney v. Kingsland, 10 Ala. 355; Waggoner v. Cooley, 17 Ill. 239; Currie v. Hart, 2 Sandf. Ch. 353; Adams v. Davidson, 10 N. Y. 309; Jacobs v. Remsen, 36 N. Y. 668; Babb v. Clemson, 10 S. & R. 419; s. c. 12 S. & R. 328; Blake v. White, 13 N. H. 267; Foster v. Woodfin, 11 Ired. 339; Robinson v. Pitzer, 3 W. Va. 335; Redfield v. Buck, 35 Conn. 328; Caldwell v. Rose, 1 Smith, 190; Reed v. Smith, 14 Ala. 380; Farnsworth v. Bell, 5 Sneed, 531; Neal v. Peden, 1 Head, 546; Grant v. Lewis, 14 Wis. 487; Deakers v. Temple, 41 Penn. 234; Carrolton Bank v. Cleveland, 15 La. An. 616; Willies v. Farley, 3 C. & P. 395; Wilbur v. Strickland, 1 Rawle, 458; Grant v. Lewis, 14 Wis. 487; Blake v. Graves, 18 Iowa, 312; Cahoon v. Marshall, 25 Cal. 197; Newlin v. Lyon, 49 N. Y. 661; Caswell v. Hill, 47 N. H. 407; Burgert v. Borchert, 59 Mo. 80; Jones v. King, 86 Ill. 225; Glaze v. Blake, 56 Ala. 379; Hilliard v. Phillips, 81 N. C. 99; Oatis v. Brown, 59 Geo. 711; Carney v. Carney, 7 Baxter, 284; U. S. v. Griswold, 8 Fed. Rep. 556; Mills v. Thompson, 72 Mo. 367.

[2] McBride v. Thompson, 8 Ala. 650.

[3] Walcott v. Keith, 22 N. H. 196; Kendall v. Hughes, 7 B. Mon. 368; Haynes v. Leppig, 40 Mich. 602; Comm. v. Fletcher, 6 Bush, 171.

[4] Trotter v. Watson, 6 Humph. 509; Donaldson v. Johnson, 2 Chand. 160; Ford v. Williams, 13 N. Y. 577; s. c. 24 N. Y. 359; Mayer v. Clark, 40 Ala. 259.

[5] Waters v. Riggin, 19 Md. 536; Walcott v. Keith, 22 N. H. 196; Upson v. Raiford, 29 Ala. 188; *vide* Williams v. Kelsey, 6 Geo. 365.

[6] Thomas v. De Graffenreid, 17 Ala. 602.

planatory of it. Anything beyond this is no part of the thing done, and consequently is inadmissible,[1] unless it is competent for some other reason.

Relations of the Parties and Events connected with the Transfer.—It is always competent to show what precedes and follows the transfer, the relations of the parties both prior and subsequent, and all the facts and circumstances surrounding it.[2] It is upon this ground that evidence of other contemporaneous transfers between the same parties is admissible.[3] It must, however, be shown that they were so connected with the transfer in controversy as to make it apparent that the parties had a common purpose in both.[4] The principle applies also to subsequent transfers.[5] But even though fraud is proved in other transfers it is not conclusive. The whole conduct of the parties with reference to the property transferred may be shown as bearing upon the question of good faith or fraudulent intent. It is true that the fraud must be in the inception of the transaction, but the subsequent acts are calculated to explain the motives which actuated

[1] Abney v. Kingsland, 10 Ala. 355; McBride v. Thompson, 8 Ala. 650; Borland v. Mayo, 8 Ala. 104; Christopher v. Covington, 2 B. Mon. 357; *vide* Burckmyers v. Mairs, Riley, 208; McCord v. McCord, 3 Rich. (N. S.) 577.

[2] Erfort v. Consalus, 47 Mo. 208; Tedrowe v. Esher, 56 Ind. 443.

[3] Van Kirk v. Wilds, 11 Barb. 520; Amsden v. Manchester, 40 Barb. 158; Gibbs v. Neely, 7 Watts, 305; M'Ilvoy v. Kennedy, 2 Bibb, 380; Benham v. Cary, 11 Wend. 83; Cumming v. Fryer, Dudley, 182; Trotter v. Watson, 6 Humph. 509; Pierson v. Tom, 1 Tex. 577; Helfrich v. Stem, 17 Penn. 143; Belt v. Raguet, 27 Tex. 471; Price v. Mahoney, 24 Iowa, 582; Erfort v. Consalus, 47 Mo. 208; McCabe v. Brayton, 38 N. Y. 196; Engraham v. Pate, 51 Geo. 337; Smith v. Schmed, 9 Fed. Rep. 483; Knowlton v. Moseley, 105 Mass. 136.

[4] Williams v. Robbins, 81 Mass. 590; Sutter v. Lackman, 39 Mo. 91; Grant v. Libby, 71 Me. 427.

[5] Lynde v. McGregor, 95 Mass. 172. [6] Collumb v. Read, 24 N. Y. 505.

the parties at the beginning and give tone to the original purpose.[1] Such subsequent acts are also admissible in favor of the grantee.[2] The transfer, however, must be judged by its terms and in the light of the contemporaneous and subsequent acts of the parties. These furnish the data for the determination of the intent and motives with which it was made.[3]

CONTEMPORANEOUS ACTS.—Evidence of the condition and acts of the parties at and about the time of the transfer is competent, for it serves to show the reasonableness of their conduct and to throw light upon their motives. It may be shown that the grantor was indebted,[4] or intoxicated,[5] or reputed to be in embarrassed circumstances,[6] or that suits were pending against him,[7] or that he subsequently became insolvent.[8] Proof of a subsequent

[1] Flanigan v. Lampman, 12 Mich. 58; Dallam v. Renshaw, 26 Mo. 533; Wilson v. Ferguson, 10 How. Pr. 175; Wright v. Linn, 16 Tex. 34; Forbes v. Waller, 25 N. Y. 430; s. c. 4 Bosw. 475; s. c. 25 How. Pr. 166; Carr v. Gale, Davies, 328; Snodgrass v. Bank, 25 Ala. 161; Blue v. Penniston, 27 Mo. 272; Warren v. Williams, 52 Me. 343; Starin v. Kelly, 36 N. Y. Sup. 366; Dambmann v. Butler, 4 T. & C. 542.

[2] Cecil Bank v. Snively, 23 Md. 253; Helfrich v. Stem, 17 Penn. 143; Graham v. Lockhart, 8 Ala. 9; Creagh v. Savage, 14 Ala. 454.

[3] Forbes v. Waller, 25 N. Y. 430; s. c. 4 Bosw. 475; s. c. 25 How. Pr. 166.

[4] Hamet v. Dundass, 4 Penn. 175; Manhattan Co. v. Osgood, 15 Johns. 162; s. c. 3 Cow. 612; Covanhovan v. Hart, 21 Penn. 495; Helfrich v. Stem, 17 Penn. 143; Smith v. Henry, 2 Bailey, 118; s. c. 1 Hill, 16; Williams v. Banks, 11 Md. 198; s. c. 19 Md. 22; Mills v. Howeth, 19 Tex. 257; Waters v. Dashiell, 1 Md. 455; King v. Bailey, 6 Mo. 575; Stewart v. Fenner, 81 Penn. 177.

[5] Delaware v. Ensign, 21 Barb. 85.

[6] Sweetster v. Bates, 117 Mass. 466.

[7] Harrell v. Mitchell, 61 Ala. 270; Barber v. Terrell, 54 Geo. 146; Jones v. King, 86 Ill. 225.

[8] King v. Poole, 61 Geo. 373; Smith v. Chenault, 48 Tex. 455.

mortgage which covered all the grantor's property is evidence as tending to prove his condition as to solvency at the time of the conveyance.[1] Evidence of the value of the property is competent.[2] It may also be shown that the grantee was unable to purchase the property,[3] or that the statements in a written instrument are false,[4] or that receipts between the parties are fraudulent,[5] or that the debtor made the transfer known,[6] or that he concealed a part of his property.[7] Evidence that the grantee was endeavoring to buy a similar piece of property,[8] or that the transfer was conducted in the ordinary way in which such transactions are conducted,[9] is not competent, for it has no tendency to prove that the transfer was *bona fide* or for a valuable consideration. But evidence that the grantee had the money before the purchase is admissible.[10] Evidence of the character either of the debtor[11] or of the grantee[12] is not admissible, for character is not directly in issue by the nature of the controversy. Heavy purchases immediately preceding the transfer may be

[1] Sweetster v. Bates, 117 Mass. 466.

[2] Stacy v. Deshaw, 14 N. Y. Supr. 449.

[3] Borland v. Mayo, 8 Ala. 104; Demeritt v. Miles, 22 N. H. 523; M'Ilvoy v. Kennedy, 2 Bibb, 380; Hyman v. Bailey, 13 La. An. 450; Amsden v. Manchester, 40 Barb. 158; Belt v. Raguet, 27 Tex. 471; Stebbins v. Miller, 94 Mass. 591; Rea v. Missouri, 17 Wall. 532; Johnson v. Lovelace, 51 Geo. 18; Sweetster v. Bates, 117 Mass. 466; McConnell v. Martin, 52 Ind. 454; *vide* Derby v. Gallup, 5 Minn. 119; Cook v. Swan, 5 Conn. 140.

[4] Peake v. Stout, 8 Ala. 647.

[5] Balt. & Ohio R. R. Co. v. Hoge, 34 Penn. 214.

[6] Paper Works v. Willett, 1 Robt. 131.

[7] Wilson v. Forsyth, 24 Barb. 105; Guerin v. Hunt, 8 Minn. 477; s. c. 6 Minn. 375.

[8] McCullock v. Doak, 68 N. C. 267.

[9] Mulford v. Tunis, 37 N. J. 256.

[10] Winfield v. Adams, 34 Mich. 437.

[11] Gutzweiler v. Lackman, 23 Mo. 168; Church v. Drummond, 7 Ind. 17.

[12] M'Kinney v. Rhoads, 5 Watts, 343; Holmesley v. Hogue, 2 Jones (N. C.) 391.

shown.[1] The declarations of one grantee are not admissible against another who holds with him as tenant in common.[2] The fact of an attorney's advice to the grantee may be shown.[3]

WITNESS CAN NOT TESTIFY TO ANOTHER'S INTENT.—The intent with which an act is done is to be ascertained from the circumstances surrounding it, and from the acts and declarations of the parties, and is therefore a deduction or inference from facts; consequently a witness can not testify in regard to the intentions of another, for he must speak of facts within his own knowledge, and not of inferences that he may draw from facts that may be known to him.[4] The debtor[5] and the grantee[6] may each testify in regard to his own intentions. Such testimony on the part of the debtor is not regarded as anything more than an expression of his opinion as to the character of

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[1] Curtis v. Moore, 20 Md. 93.

[2] Manhattan Co. v. Osgood, 3 Cow. 612; s. c. 15 Johns. 162; Graham v. Lockhart, 8 Ala. 9; Governor v. Campbell, 17 Ala. 566; Cuyler v. McCartney, 40 N. Y. 221; s. c. 33 Barb. 165.

[3] Goodgame v. Cole, 12 Ala. 77; Nicholson v. Leavitt, 4 Sandf. 252; s. c. 6 N. Y. 510; s. c. 10 N. Y. 591; Fisher v. True, 38 Me. 534; *vide* Lee v. Lamprey, 43 N. H. 13.

[4] Peake v. Stout, 8 Ala. 647; Spaulding v. Strang, 36 Barb. 310; s. c. 32 Barb. 235; 37 N. Y. 135; 38 N. Y. 9; Mattison v. Demarest, 4 Robt. 161; Hathaway v. Brown, 22 Minn. 214.

[5] Forbes v. Waller, 4 Bosw. 475; s. c. 25 N. Y. 430; s. c. 25 How. Pr. 166; Paper Works v. Willett, 1 Robt. 131; Law v. Payson, 32 Me. 521; Seymour v. Beach, 4 Vt. 493; Wolf v. Carothers, 3 S. & R. 240; Miner v. Phillips, 42 Ill. 123; Spaulding v. Strang, 36 Barb. 310; s. c. 32 Barb. 235; 37 N. Y. 135; 38 N. Y. 9; Forbes v. Logan, 4 Bosw. 475; Matthews v. Poultney, 33 Barb. 127; Seymour v. Wilson, 14 N. Y. 567; Watkins v. Wallace, 19 Mich. 57; Mulford v. Tunis, 37 N. J. 256; Reeves v. Shry, 39 Tex. 634,

[6] Bedell v. Chase, 34 N. Y. 386; Paxton v. Boyce, 1 Tex. 317; Edwards v. Currier, 43 Me. 474; Wheelden v. Wilson, 44 Me. 1; Potter v. McDowell, 31 Mo. 62; Snow v. Paine, 114 Mass. 520.

the transaction, and is not conclusive,[1] and unless it is supported by other evidence, is entitled to but little weight.[2] A party to the transfer can not be asked whether it was made for an improper purpose, for that is a mere inquiry as to his opinion; nor can he be asked whether he understood that the transfer was for an improper purpose, for that allows him to draw his conclusions.[3] The debtor's mere suppositions in regard to his solvency are inadmissible.[4]

RECITALS IN DEEDS ARE PRIMA FACIE.—As the presumption is always in favor of fairness, the statement of the payment of the consideration in an instrument is *prima facie* evidence of the fact.[5] It is, however, the

[1] Bates v. Ableman, 13 Wis. 644; Newman v. Cordell, 43 Bard. 448; Loker v. Haynes, 11 Mass. 498; Brown v. Osgood, 25 Me. 505; Griffin v. Marquardt, 21 N. Y. 121; s. c. 17 N. Y. 28; Keteltas v. Wilson, 36 Barb. 298; s. c. 23 How. Pr. 69; *vide* Hathaway v. Brown, 18 Minn. 414.

[2] Atwood v. Impson, 20 N. J. Eq. 150; Work v. Ellis, 50 Barb. 512; Kittering v. Parker, 8 Ind. 44; Borland v. Walker, 7 Ala. 269.

[3] Blant v. Gabler, 77 N. Y. 461; s. c. 8 Daly, 48.

[4] Ogden v. Peters, 15 Barb. 560; s. c. 21 N. Y. 23.

[5] Glenn v. Grover, 3 Md. 212; s. c. 3 Md. Ch. 29; Faringer v. Ramsay, 2 Md. 365; s. c. 4 Md. Ch. 33; Glenn v. Randall, 2 Md. Ch. 220; Moore v. Blondheim, 19 Md. 172; Stockett v. Holliday, 9 Md. 480; Mayfield v. Kilgour, 31 Md. 240; Marden v. Babcock, 43 Mass. 99; Every v. Edgerton, 7 Wend. 259; Foster v. Hall, 29 Mass. 89; Lutton v. Hesson, 18 Penn. 109; Clark v. Depew, 25 Penn. 509; Hundley v. Buckner, 14 Miss. 70; Hempstead v. Johnston, 18 Ark. 123; Brown v. Bartee, 18 Miss. 268; Splawn v. Martin, 17 Ark. 146; Brinley v. Spring, 7 Me. 241; Merrill v. Williamson, 35 Ill. 529; Gates v. Labeaume, 19 Mo. 17; Mandel v. Peay, 20 Ark. 325; Rindskoff v. Gugnenheim, 3 Cold. 284; Shontz v. Brown, 27 Penn. 123. *Contra*, Merrill v. Locke, 41 N. H. 486; Kimball v. Fenner, 12 N. H. 248; Prescott v. Hayes, 43 N. H. 593; Belknap v. Wendell, 21 N. H. 175; Ferguson v. Clifford, 37 N. H. 86; Claywell v. McGimpsie, 4 Dev. 89; Fermester v. McRorie, 12 Ired. 287; Governor v. Campbell, 17 Ala. 566; Branch Bank v. Kinsey, 5 Ala. 9; McCain v. Wood, 4 Ala. 258; McGintry v. Reeves, 10 Ala. 137; McCaskle v. Ama-

lowest species of *prima facie* evidence, inasmuch as the same motives which would induce parties to make and execute a fraudulent conveyance would induce them to insert an acknowledgment of the payment and receipt of the consideration;[1] and therefore where there is any evidence of fraud there must be other proof of the consideration.[2] The declarations of the debtor, not made in the presence of the grantee, are not admissible to prove the consideration.[3] But declarations of the debtor prior to the alleged inception of the fraud are admissible in favor of the grantee.[4] Proof can not be given of the payment of the consideration after the commencement of the suit.[5]

When Proof of Consideration Material.—A deed executed in good faith passes the interest of the grantor in the property of the grantee, whether any consideration is actually paid or not as between the parties to it.[6] It is

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rine, 12 Ala. 17; Dolin v. Gardner, 15 Ala. 758; Ferguson v. Gilbert, 16 Ohio St. 88; Vogt v. Ticknor, 48 N. H. 242; Brown v. Knox, 6 Mo. 302; College v. Powell, 12 Gratt. 372; Crow v. Ruby, 5 Mo. 484; Kinnard v. Daniel, 13 B. Mon. 496; Hubbard v. Allen, 59 Ala. 283; Horton v. Dewey, 53 Wis. 410.

[1] Clapp v. Tirrell, 37 Mass. 247; Clark v. Depew, 25 Penn. 509; Morris Canal Co. v. Stearns, 23 N. J. Eq. 414; U. S. v. Griswold, 8 Fed. Rep. 556.

[2] Whitaker v. Garnett, 3 Bush. 402; Redfield Manuf. Co. v. Dysart, 62 Penn. 62; Allen v. Cowan, 28 Barb. 99; s. c. 23 N. Y. 502; Rogers v. Hall, 4 Watts, 359; Zerbe v. Miller, 16 Penn. 488; Mead v. Phillips, 1 Sandf. Ch. 83.

[3] Yardley v. Arnold, 1 Car. & M. 434; Hooper v. Edwards, 18 Ala. 280; Colquitt v. Thomas, 8 Geo. 258; Taylor v. Moore, 2 Rand. 563; Coole v. Braham, 3 Exch. 183; U. S. v. Mertz, 2 Watts, 406; Whiting v. Johnson, 11 S. & R. 328; Wilson v. Hillhouse, 14 Iowa, 199; Barber v. Terrell, 54 Geo. 146. *Contra*, Moss v. Dearing, 45 Iowa, 530.

[4] Dwight v. Brown, 9 Conn. 83; Morris Canal Co. v. Stearns, 23 N. J. Eq. 414.

[5] Angrave v. Stone, 45 Barb. 35.

[6] Bank v. Housman, 6 Paige, 526; Doe v. Hurd, 8 Blackf. 310; Jackson v. Garnsey, 16 Johns. 189; Cunningham v. Dwyer, 23 Md. 219.

only when an instrument is assailed by creditors that the amount and character of the consideration become material. In such controversies it is a leading principle that no evidence is admissible which contradicts the deed or changes its character.[1] The kind of consideration determines whether the instrument belongs to the class of deeds known as bargains and sales, or covenants to stand seized to uses, and to whichever class it belongs its character can not be changed by parol evidence.[2]

What Evidence of Consideration Admissible.—If no consideration is expressed in a deed, evidence of a consideration may be given.[3] If the deed purports to be for a valuable consideration, evidence may be given of an additional consideration of the same kind as that so set forth.[4] This additional consideration may consist either of money paid to the grantor's creditors,[5] or an indebtedness due to the grantee,[6] or a liability as indorser,[7] or the grantee's note,[8] or a claim for damages,[9] or future advances,[10] or marriage,[11] or any other valuable considera-

[1] Betts v. Union Bank, 1 H. & G. 175; Galbraith v. Cook, 30 Ark. 417. [2] Cunningham v. Dwyer, 23 Md. 219.

[3] Peacock v. Monk, 1 Ves. Sr. 127; Howell v. Elliott, 1 Dev. 76; Banks v. Brown, 1 Riley Ch. 131; s. c. 2 Hill Ch. 558.

[4] Anderson v. Tydings, 3 Md. Ch. 167; Bullard v. Briggs, 24 Mass. 533; Banks v. Brown, 1 Riley Ch. 131; s. c. 2 Hill Ch. 558; Cunningham v. Dwyer, 23 Md. 219; McNeal v. Glenn, 4 Md. 87; s. c. 3 Md. Ch. 349.

[5] Glenn v. Randall, 2 Md. Ch. 220; Waters v. Riggin, 19 Md. 536.

[6] Anderson v. Tydings, 3 Md. Ch. 167; Buffum v. Green, 5 N. H. 71; Cunningham v. Dwyer, 23 Md. 219; Credle v. Carrawan, 64 N. C. 422; Hubbard v. Allen, 59 Ala. 283.

[7] McKinster v. Babcock, 26 N. Y. 378.

[8] Mayfield v. Kilgour, 31 Md. 240.

[9] Fellows v. Emperor, 13 Barb. 92.

[10] Craig v. Tappin, 2 Sandf. Ch. 78; Bank v. Finch, 3 Barb. Ch. 293; Lawrence v. Tucker, 23 How. 14; Cole v. Albers, 1 Gill. 412; Shirras v. Craig, 7 Cranch. 34. [11] Leach v. Shelby, 58 Miss. 681.

tion.[1] A mere secret parol trust to apply the property to the benefit of the grantor's creditors is not sufficient.[2] A mere nominal consideration may, according to circumstances, constitute a voluntary deed,[3] or a deed founded upon a valuable consideration.[4]

From other Parties.—It is not necessary that the proof should show that the consideration passed immediately from the grantee to the grantor. If A. bargains for land with B. and pays the agreed price, and at A.'s request the deed is made to C. without any fraudulent intent, C. may maintain his title to the property by proving the consideration so paid. Even if the design of the conveyance were that C. should hold the land in trust for A., but he has executed no writing by which that trust can be legally proved, still the title of C. can not be impeached by a creditor of B. on that account, for a declaration of trust may at any time afterwards be executed, or A. may confide in the integrity of C., and it is a matter only between A. and C. whether the trust be executed or not. In the case supposed B. has obtained the value of his land, and his creditors are not necessarily injured.[5]

Contemporaneous Deeds.—For the purpose of repelling any imputation of fraud it may be shown that a

[1] Tyler v. Carlton, 7 Me. 175.

[2] Jones v. Slubey, 5 H. & J. 372; Bireley v. Staley, 5 G. & J. 432; Pettibone v. Stevens, 15 Conn. 19.

[3] Baxter v. Sewell, 3 Md. 334; s. c. 2 Md. Ch. 447; Walker v. Burrows, 1 Atk. 93; Wickes v. Clark, 8 Paige, 161; s. c. 3 Edw. Ch. 58; Ridgeway v. Underwood, 4 Wash. C. C. 129; McKinley v. Combs, 1 Mon. 105; Felder v. Harper, 12 Ala. 612.

[4] Cunningham v. Dwyer, 23 Md. 219; Harvey v. Alexander, 1 Rand. 219.

[5] Bullard v. Briggs, 24 Mass. 533; Harvey v. Alexander, 1 Rand. 219.

deed was made in consideration of another instrument of the same date. Whether they constitute parts of the same transaction depends upon all the surrounding circumstances of each particular case, and not upon the simple fact whether they are or are not, by express references, grafted into or connected with each other, and is generally a question of fact.[1]

NOTES AND JUDGMENTS.—Evidence may be given to show what was the consideration of a note which purports to be for value received.[2] A judgment confessed in the name of one person may be shown by parol to have been given for debts due to others.[3]

CONSIDERATION CAN NOT BE VARIED.—A deed purporting to be for a valuable consideration can not be set up as a gift.[4] If it purports to be given for love and affection, proof of a valuable consideration is inadmissible. The statement of a particular consideration imports the whole consideration and is a negative to any other, and such evidence would, if admitted, vary the consideration, and consequently is not competent.[5] Under the expression "other good causes and considerations," the considerations of love and affection may be shown.[6] A difference be-

[1] Harman v. Richards, 10 Hare, 81; Gale v. Williamson, 8 M. & W. 405; Keen v. Preston, 24 Md. 395; Belt v. Raguet, 27 Tex. 471.

[2] Harris v. Alcock, 10 G. & J. 226.

[3] Insurance Co. v. Wallis, 23 Md. 173; Harris v. Alcock, 10 G. & J. 226; Groschen v. Thomas, 20 Md. 234.

[4] Hildreth v. Sands, 2 Johns. Ch. 35; s. c. 14 Johns. 493; Betts v. Union Bank, 1 H. & G. 175; Rollins v. Mooers, 25 Me. 192; *vide* Brackett v. Wait, 4 Vt. 389.

[5] Ellinger v. Crowl, 17 Md. 361; McNeal v. Glenn, 4 Md. 87; s. c. 3 Md. Ch. 349; Hindes v. Longworth, 11 Wheat. 199; Baxter v. Sewell, 3 Md. 334; s. c. 2 Md. Ch. 447; Bean v. Smith, 2 Mason, 252; Potter v. Gracie, 58 Ala. 303; *vide* Henderson v. Dodd, 1 Bailey Ch. 138.

[6] Pomeroy v. Bailey, 43 N. H. 118.

tween the debts described as the consideration of a deed and those offered in evidence, either as to names, dates or amounts, does not necessarily affect the validity of the instrument, but at most merely furnishes grounds for an unfavorable presumption.[1]

EVIDENCE ON VARIOUS POINTS.—The grantee may prove his ignorance of the grantor's insolvency.[2] The debtor's schedules in bankruptcy,[3] and his prior offers to sell the property to other persons,[4] are not competent evidence. It may be shown that up to the time of the transfer the debtor was applying his means in discharge of his debts.[5] Proof that the grantor used part of his property in paying his debts at a subsequent time is not competent where no connection in time and purpose is shown between the payment and the transfer.[6] A letter from the debtor to the grantee notifying him of the execution of a mortgage in his favor is admissible.[7] A verdict setting aside the transfer for fraud in another suit between other parties,[8] or the issuing of an attachment by another creditor, is not competent evidence.[9] Proof may be given of declarations made by the grantee prior to the transfer of an intention to assist the debtor to evade the claims of his creditors.[10] Declarations by the debtor of mere abstract opinions—as, for instance, that a man ought to secure something for his family—are irrelevant.[11]

[1] Graham v. Lockhart, 8 Ala. 9; Pomeroy v. Manin, 2 Paine, 476.

[2] Filley v. Register, 4 Minn. 391.

[3] Carr v. Gale, Davies, 328; Hathaway v. Brown, 18 Minn. 414; Barber v. Terrell, 54 Geo. 146.

[4] Tifts v. Bunker, 55 Me. 178; Fisher v. True, 38 Me. 534.

[5] Mower v. Hanford, 6 Minn. 535.

[6] Rice v. Cunningham, 116 Mass. 466.

[7] Sweetzer v. Mead, 5 Mich. 107.

[8] Mower v. Hanford, 6 Minn. 535. [9] Miner v. Phillips, 42 Ill. 128.

[10] Foster v. Thompson, 71 Mass. 453; Helfrich v. Stem, 17 Penn. 143.

[11] Whiting v. Johnson, 11 S. & R. 328.

Burden of Proof.—It is a universal principle both at law and in equity that the law never presumes fraud. *Odiosa et inhonesta non sunt in lege præsumenda et in facto quod se habet ad bonum et malum de bono quam malo præsumendum est.* The burden of proof, therefore, rests upon the creditors whenever they assail a transfer for fraud.[1] It is not necessary, however, to establish it by direct and positive proof, for this can seldom be done. Generally the first effort of a man who intends to commit a fraud is to throw a veil over the transaction, to shield it against assault and baffle all attempts at detection. No man willingly furnishes the evidence of his own turpitude. Fraud is, for this reason, rarely perpetrated openly and in broad daylight. It is committed in secret and privately, and usually hedged in and surrounded by all the guards which can be invoked to prevent discovery and exposure. Its operations are frequently circuitous and difficult of detection. It is therefore usually established by circumstantial evidence.[2]

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[1] Thornton v. Hook, 36 Cal. 223; Foster v. Hall, 29 Mass. 89; Nichols v. Patten, 18 Me. 231; Blaisdell v. Cowell, 14 Me. 370; Fifield v. Gaston, 12 Iowa, 218; Bell v. Hill, 1 Hayw. 72; Sutter v. Lackman, 39 Mo. 91; Elliott v. Stoddard. 98 Mass. 145; Miller v. Finn, 1 Neb. 254; Pringle v. Sizer, 2 Rich. (N. S.) 59; Brewer v. Gay, 24 La. An. 35; Hathaway v. Brown, 18 Minn. 414; Grant v. Ward, 64 Me. 239; Morgan v. Alvey, 53 Ind. 6; Wilds v. Bogan, 55 Ind. 331; Darling v. Hurst, 39 Mich. 765; Pratt v. Pratt, 96 Ill. 184; Hamilton v. Bishop, 22 Iowa, 211.

[2] Bullock v. Narrott, 49 Ill. 62; Kempner v. Churchill, 8 Wall. 362; Floyd v. Goodwin, 8 Yerg. 484; Sibley v. Hood, 3 Mo. 290; Wright v. Grover, 27 Ill. 426; King v. Moon, 42 Mo. 551; Newman v. Cordell, 43 Barb. 448; Hicks v. Stone, 13 Minn. 434; Pope v. Andrews, 1 S. & M. Ch. 135; Land v. Jeffries, 5 Rand. 599; Rogers v. Hall, 4 Watts, 359; Curtis v. Moore, 20 Md. 93; McConihe v. Sawyer, 12 N. H. 396; Kane v. Drake, 27 Ind. 29; Chapman v. O'Brien, 34 N. Y. Sup. 524; Rea v. Missouri, 17 Wall. 532; Farmer v. Calvert, 44 Ind. 209; Burgert v. Borchert, 59 Mo. 80; Means v. Feaster, 4 Rich. (N. S.) 249; Thames v. Rimbert, 63 Ala. 561; Tognini v. Kyle, 15 Nev. 464; State v. Estel, 6 Mo. Ap. 6; Kurtz v. Miller, 26 Kans. 548.

MODE OF PROOF.—No transfer is fraudulent unless it is made with an intent to delay, hinder or defraud creditors, and this intent is an emotion of the mind, and can usually be shown only by the acts and declarations of the party.[1] These acts and declarations, and all the concomitant circumstances, must be established, and then the motive may be deduced from them in accordance with those principles which are shown by experience and observation to rule human conduct.[2] The proof in each case will consequently depend upon its own circumstances.[3] It usually consists of many items of evidence which, standing detached and alone, would be immaterial, but which, in connection with others, tend to illustrate and shed light upon the character of the transaction and show the position in which the parties stand, and their motives, conduct and relations to each other. *Quæ tingula non prosunt, juncta juvant.* Although the evidence is generally circumstantial it is often as potent as direct testimony. Sometimes a combination of circumstances characterizes a transaction so plainly and so clearly as to stamp upon it unerring and indelible marks of fraud which can not be mistaken, and the transaction itself present phases so remarkable and peculiar that no fair-minded person can hesitate to pronounce it fraudulent. These *indicia* are often the clearest proof and quite as reliable as positive evidence.[4]

FRAUD MAY BE PRESUMED.—It is sometimes said that fraud can never be presumed, but the fact that it is generally established by circumstantial evidence shows that this expression is incorrect. The law never presumes

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[1] Babcock v. Eckler, 24 N. Y. 623. [2] Filley v. Register, 4 Minn. 391.
[3] Huff v. Roane, 22 Ark. 184; Harrell v. Mitchell, 61 Ala. 270.
[4] Newman v. Cordell, 43 Barb. 448; Boies v. Henney, 32 Ill. 130; Hopkins v. Sievert, 58 Mo. 201.

fraud, but fraud itself may be established by inference the same as any other fact. Presumptions are of two kinds, legal and natural. Allegations of fraud are sometimes supported by one and sometimes by the other, and are seldom, almost never, sustained by that direct and plenary proof which excludes all presumption. Fraud is established by mere presumption of law, when the necessary consequence of an act is to delay or defraud. A natural presumption is the deduction of one fact from another. When creditors are about to be cheated, it is very uncommon for the perpetrators to proclaim their purpose and call in witnesses to see it done. A resort to presumptive evidence, therefore, becomes absolutely necessary to protect the rights of honest men from this as from other invasions. Fraud in the transfer of goods or land may be shown by the same amount of proof as will establish any other fact in its own nature as likely to exist. In any case the number and cogency of the circumstances from which guilt may be inferred are proportioned to the original improbability of the offence. The frequency of frauds upon creditors, the difficulty of detection, the powerful motives which tempt an insolvent man to commit it, and the plausible casuistry with which it is sometimes reconciled to the consciences even of persons whose previous lives have been without reproach, are considerations which prevent its classification among the grossly improbable violations of moral duty, and often permit it to be presumed from facts which may seem slight. How much evidence is required to raise a presumption of actual fraud can not be determined according to any inflexible rule.[1]

[1] Kaine v. Weigley, 22 Penn. 179; Kendall v. Hughes, 7 B. Mou. 368; Reed v. Noxon, 48 Ill. 323; Colquitt v. Thomas, 8 Geo. 258; Kelly v. Lenihan, 56 Ind. 448; White v. Perry, 14 W. Va. 66.

AMOUNT OF PROOF.—While the law abhors fraud, it is also unwilling to impute it on slight and trivial evidence, and thereby cast an unjust reproach upon the character of the parties.[1] Such an imputation is grave in its character and can only be sustained on satisfactory proof. If the evidence is so conflicting that no conclusion can be reached, the transaction must be sustained upon the principle that the burden of proof is on the party who assails it, and if he does no more than create an equilibrium he fails to make out his case.[2] Mere suspicion leading to no certain results is not sufficient. A legal title will not be divested upon mere conjectures or evidence loose and indeterminate in its character.[4] Fraud will never be imputed when the circumstances and facts upon which it is predicated may consist with honesty and purity of intention.[5]

NOT INCONSISTENT WITH OTHER THEORY.—It is not necessary, however, that the evidence tending to the conclusion of fraud should be incapable of being accounted for

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[1] Thompson v. Sanders, 6 J. J. Marsh. 94; Blow v. Gage, 44 Ill. 208.

[2] Kaine v. Weigley, 22 Penn. 179; Bodine v. Simmons, 38 Mich. 682.

[3] Parkhurst v. McGraw, 24 Miss. 134; Blow v. Gage, 44 Ill. 208; Waddingham v. Loker, 44 Mo. 132; Bartlett v. Blake, 37 Me. 124; Belk v. Massey, 11 Rich. 614; Roberts v. Guernsey, 3 Grant, 237; Phettiplace v. Sayles, 4 Mason, 312; Hale v. Saloon Omnibus Co., 4 Drew, 492; s. c. 28 L. J. Ch. 777; Thompson v. Sanders, 6 J. J. Marsh. 94; Glenn v. Grover, 3 Md. 212; s. c. 3 Md. Ch. 29; Faringer v. Ramsay, 2 Md. 365; s. c. 4 Md. Ch. 33; Buck v. Sherman, 2 Doug. (Mich.) 176; White v. Trotter, 21 Miss. 30; Hoose v. Robbins, 18 La. An. 648; King v. Moon, 42 Mo. 551; Waterman v. Donalson, 43 Ill. 29; Jaeger v. Kelly, 44 How. Pr. 122; s. c. 52 N. Y. 274; Darling v. Hurst, 39 Mich. 765; Pogodinski v. Kruger, 44 Mich. 79.

[4] Fifield v. Gaston, 12 Iowa, 218.

[5] Stiles v. Lightfoot, 26 Ala. 443; Lyman v. Cessford, 15 Iowa, 229; Dallam v. Renshaw, 26 Mo. 533; Schofield v. Blind, 33 Iowa, 175; Rumbolds v. Parr, 51 Mo. 592; Page v. Dixon, 59 Mo. 43; Drummond v. Couse, 39 Iowa, 442; Burleigh v. White, 64 Me. 23; Tompkins v. Nichols, 53 Ala. 199; Schultze v. Hoagland, 85 N. Y. 464; State v. Estel, 6 Mo. Ap. 6.

upon any other hypothesis. There is no rule of evidence or principle of law which requires that the circumstances must be of so conclusive a nature and tendency as to exclude every other hypothesis than the one sought to be established, in order to authorize the inference of fraud from circumstantial evidence.

MUST BE SATISFACTORY.—What amount or weight of evidence is sufficient proof of a fraudulent intent is not a matter of legal definition. If the evidence is admissible as conducing in any degree to the proof of the fact, the only legal test applicable to it upon such an issue is its sufficiency to satisfy the mind and conscience and produce a satisfactory conviction or belief.[1] The proof, however, must be satisfactory.[2] It must be so strong and cogent as to satisfy a man of sound judgment of the truth of the allegation.[3] It need not possess such a degree of force as to be irresistible,[4] but there must be evidence of tangible facts from which a legitimate inference of a fraudulent intent may be drawn.[5] Circumstances affording a strong presumption are sufficient,[6] but the presumption must be drawn from pregnant facts and not from far-fetched probabilities.[7] Inferences are to be drawn from such facts not singly but as a whole.[8] As an allegation of fraud is against the presumption of honesty, it requires stronger

[1] Linn v. Wright, 18 Tex. 317; Carter v. Gunnels, 67 Ill. 270.

[2] King v. Moon, 42 Mo. 551; Fifield v. Gaston, 12 Iowa, 218; Lillie v. McMillan, 52 Iowa, 463; Bixby v. Carskaddon, 58 Iowa, 533; Rice v. Dignowithy, 18 Miss. 57.

[3] Henry v. Henry, 8 Barb. 588; Lockhard v. Beckley, 10 W. Va. 87.

[4] Carter v. Gunnels, 67 Ill. 270.

[5] Jaeger v. Kelly, 44 How. Pr. 122; s. c. 52 N. Y. 274.

[6] Parkhurst v. McGraw, 24 Miss. 134; Hempstead v. Johnston, 18 Ark. 123.

[7] Paxton v. Boyce, 1 Tex. 317.

[8] Stebbins v. Miller, 94 Mass. 591.

proof than if no such presumption existed.[1] As it is against a presumption of fact, perhaps often a slight one, it requires somewhat more evidence than would suffice to prove the acknowledgment of an obligation or the delivery of a chattel.[2] It is not necessary, however, that the fraud shall be proved beyond a reasonable doubt. Issues of fact in civil cases are determined by a preponderance of testimony, and the rule applies as well to cases in which fraud is imputed as to any other. If the evidence produces a rational belief, it can not be discarded although some doubt remains.[3] If the evidence is of sufficient force to produce a preponderance of assent in favor of fraud it is sufficient.[4] The payment of a full price does not purify a transaction, but is entitled to great weight when the proof of fraud is not clear.[5]

Same Rule in Equity as at Law.—In the proof of a fraudulent intent the same general rule prevails in equity as at law. The law does not presume fraud, but it must be established by evidence. A court of equity is also governed by the same principles as a court of law in drawing inferences from the testimony placed before it. The difficulty of demonstrating the intention from the overt acts and conduct of the parties furnishes no reason for the assertion of the power by a judge guided by no more certain rule than his own arbitrary conclusions, to presume a fraudulent intent from his own vague suspicions of the

[1] White v. Beltis, 9 Heisk. 645. [2] Hatch v. Bayley, 66 Mass. 27.

[3] Ford v. Chambers, 19 Cal. 143; Bryant v. Simoneau, 5 Ill. 324; McConihe v. Sawyer, 12 N. H. 396; Rice v. Dignowithy, 12 Miss. 57; Watkins v. Wallace, 19 Mich. 57; Alston v. Rowles, 13 Fla. 117; Tripner v. Abrahams, 47 Penn. 220; Lillie v. McMillan, 52 Iowa, 463; Bixby v. Carskaddon, 58 Iowa, 533.

[4] Carter v. Gunnells, 67 Ill. 270; Harrell v. Mitchell, 61 Ala. 270.

[5] Kittering v. Parker, 8 Ind. 44.

nature and character of the transaction unassisted and uncontrolled by any certain and fixed principles. The character of a transaction is not thus dependent on the peculiar notions of the judge as to what will constitute good or ill faith.[1] The only exception to the rule is where the price given by the grantee is inadequate. When a transfer is of such indecisive and dubious aspect that it can not be either entirely suppressed or entirely supported with satisfaction, a court of equity may allow it to stand as a security for the amount actually paid and let the creditors in upon the balance. The creditors thus get what in equity and good conscience they ought to have and the grantee ought not to withhold from them.[2]

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[1] Wilson v. Lott, 5 Fla. 305; *vide* King v. Moon, 42 Mo. 551; Hempstead v. Johnson, 18 Ark. 123.

[2] Boyd v. Dunlap, 1 Johns. Ch. 478; Bigelow v. Ayrault, 46 Barb. 143; Herne v. Meeres, 1 Vern. 465; s. c. 2 Bro. C. C. 177, n.; Bean v. Smith, 2 Mason, 252; McArthur v. Hoysradt, 11 Paige, 495; Barrow v. Bailey, 5 Fla. 9; Scott v. Winship, 20 Geo. 429; Farmers' Bank v. Long, 7 Bush, 337; McMeekin v. Edmonds, 1 Hill Ch. 288; Garland v. Rives, 4 Rand. 282; Barnwell v. Ward, 1 Atk. 260; Clements v. Moore, 6 Wall. 299; Drury v. Cross, 7 Wall. 299; Doughten v. Gray, 10 N. J. Eq. 323; Bennett v. Musgrove, 2 Ves. Sr. 51; Ward v. Shallet, 2 Ves. Sr. 16; Trimble v. Ratcliffe, 9 B. Mon. 511; s. c. 12 B. Mon. 32; Bailey v. Kennedy, 2 Del. Ch. 20; Loring v. Dunning, 16 Fla. 119; Hartfield v. Simmons, 12 Heisk. 253; Shute v. Sturm, 6 Baxter, 139; Green v. Stuart, 7 Baxter, 418; Hinkle v. Wilson, 53 Md. 287.

CHAPTER XXIV.

EXTENT OF GRANTEE'S LIABILITY.

DECREE MUST CONFORM TO BILL.—A creditor can not subject any property to the satisfaction of his demand which he does not claim by his bill.[1] The decree against the grantee must in general be for a surrender of the property, and not for an absolute sum.[2] It will not affect a prior transfer made between the parties in good faith.[3]

GRANTEE NOT LIABLE AFTER SURRENDER.—An honest man will not accept a fraudulent conveyance, and a party who holds property fraudulently will, as soon as he comes to a sense of his moral duty, restore it to those to whom it belongs. He ought generally to give it back to the debtor, in order that it may be applied to his debts if wanted, or to his benefit if not necessary for that purpose. Although the law for the purpose of discouraging fraud will not compel him to restore it to the debtor, yet no person who possesses a sense of justice or honesty will retain it. The relation between the grantee and creditors is different; there is no express obligation between them. The creditors, however, ought to receive their debts, and the law gives them a claim to the property, and charges the grantee as a trustee in consequence of his possession. The trust is not express, but arises by operation of law, in consequence of his having in his hands that which

[1] Bozman v. Draughan, 3 Stew. 243; Wilson v. Horr, 15 Iowa, 489.
[2] Bozman v. Draughan, 3 Stew. 243; Greer v. Wright, 6 Gratt. 154.
[3] Murray v. Riggs, 15 Johns. 571; s. c. 2 Johns. Ch. 565.

ought to be applied to the satisfaction of their demands. It depends, therefore, on the possession of the property. If the grantee, therefore, divests himself in good faith of that which he could not retain without dishonesty before the right of the creditors to call him to an account accrues, there is nothing remaining upon which to raise a trust, and the relation of trustee ceases.[1] The grantee for the same reason can not be held to account for the property, or the proceeds arising from a sale of it, which have been applied by him in good faith to the payment of the debts of the grantor.[2] In this respect there is no distinction between a transfer which is fraudulent in fact and one which is fraudulent in law.[3] Unless the commencement of the suit gives notice of the cause of action, the grantee will be protected for payments made before such notice is given.[4]

PROCEEDS.—The grantee is construed to be a trustee for the creditors, and as such is responsible for all his acts in disposing of the property fraudulently conveyed to him. If he has parted with it he must account for the value. *Is autem dolo malo emit, bona fide autem ementi vendidit, in*

[1] Swift v. Holdridge, 10 Ohio, 230; Stickney v. Crane, 35 Vt. 89; Rayner v. Whicher, 88 Mass. 292; Wheeler v. Kirtland, 23 N. J. Eq. 13; Warner v. Blakeman, 4 Abb. App. 530; Thomas v. Goodwin, 12 Mass. 140; *vide* Baker v. Bartol, 6 Cal. 483.

[2] Bostwick v. Beizer, 10 Abb. Pr. 197; Collumb v. Read, 24 N. Y. 505; Grover v. Wakeman, 4 Paige, 23; s. c. 11 Wend. 187; Ames v. Blunt, 5 Paige, 13; Strong v. Skinner, 4 Barb. 546; Averill v. Loucks, 6 Barb. 470; *in re* Wilson, 4 Penn. 430; Weber v. Samuel, 7 Penn. 499; Kaupe v. Bridge, 2 Robt. 459; Cummings v. McCullough, 5 Ala. 324; Butler v. Jaffray, 12 Ind. 504; Stickney v. Crane, 35 Vt. 89; Therasson v. Hickok, 37 Vt. 454; White v. Banks, 21 Ala. 705; How v. Camp, Walk. Ch. 427; Bryant v. Young, 21 Ala. 264; Crawford v. Kirksey, 55 Ala. 282; *vide* Barcroft v. Snodgrass, 1 Cold. 430.

[3] Ames v. Blunt, 5 Paige, 13. [4] Weber v. Samuel, 7 Penn. 499.

solidum pretium rei quod accepit tenebitur.[1] A court of equity follows the proceeds of the property and affords a remedy by turning the legal owner into a trustee for the benefit of creditors.[2] The proceeds may be followed into any property in which it has been invested so far as it can be traced.[3] The grantee is liable for property which he has converted to his own use.[4] If he sells the property and receives insufficient security, the loss falls upon him, and not upon the creditors. If he impedes the creditors by unnecessary litigation, he will be held to make good all loss which may be occasioned by his unjust interference.[6] When he gives notes as a consideration for the transfer, he furnishes the debtor with facilities for de-

[1] Dig. Lib. 42, tit. 9.

[2] Halbert v. Grant, 4 Mon. 580; Wright v. Hancock, 3 Munf. 521; Hopkirk v. Randolph, 2 Brock. 132; How v. Camp, Walk. Ch. 427; Grimsley v. Hooker, 3 Jones Eq. 4; Backhouse v. Jett, 1 Brock. 500; Bryant v. Young, 21 Ala. 264; Van Winkle v. Smith, 26 Miss. 491; Swinford v. Rogers, 23 Cal. 233; Jones v. Reeder, 22 Ind. 111; Davis v. Gibbon, 24 Iowa, 257; Ames v. Blunt, 5 Paige, 13; Keep v. Sanderson, 2 Wis. 42; s. c. 12 Wis. 352; Kelly v. Lane, 42 Barb. 594; s. c. 18 Abb. Pr. 229; s. c. 28 How. Pr. 128; Hawkins v. Allston, 4 Ired. Eq. 137; McGill v. Harman, 2 Jones Eq. 179; Brown v. Godsey, 2 Jones Eq. 417; Clements v. Moore, 6 Wall. 299; Alexander v. Todd, 1 Bond, 175; Hammond v. Hudson River Co., 20 Barb. 378; Hubbell v. Currier, 92 Mass. 333; Thompson v. Bickford, 19 Minn. 17; Fullerton v. Viall, 42 How. Pr. 294; McCrassley v. Hasslock, 4 Baxter, 1; *vide* Kaupe v. Bridge, 2 Robt. 459. The proceeds can not be reached by an action at law. Lawrence v. Bank, 35 N. Y. 320; s. c. 3 Robt. 142; Simpson v. Simpson, 7 Humph. 275; Tubb v. Williams, 7 Humph. 367; Campbell v. Erie R. R. Co., 46 Barb. 540; Childs v. Derrick, 1 Yerg. 79; Richards v. Ewing, 11 Humph. 327. *Contra*, Abney v. Kingsland, 10 Ala. 355; Carvill v. Stout, 10 Ala. 796; Lynch v. Welsh, 3 Penn. 294; Heath v. Paige, 63 Penn. 280; French v. Breidelman, 2 Grant, 319.

[3] Clements v. Moore, 6 Wall. 299; McGill v. Harman, 2 Jones Eq. 179.

[4] Van Winkle v. Smith, 26 Miss. 491; How v. Camp, Walk. Ch. 427.

[5] Robinson v. Boyd, 17 Mich. 128; Tams v. Richards, 26 Penn. 97; Gillett v. Bate, 86 N. Y. 87.

[6] Watson v. Kennedy, 3 Strobh. Eq. 1.

frauding his creditors, and will therefore be held liable for the notes that are misapplied.[1] If the property has been mixed with other property of the grantee so that the proceeds can not be ascertained, he may be charged with the value and interest thereon.[2]

INSURANCE.—The creditors have no claim to the money paid to him upon a policy of insurance taken out by him upon the property. He holds the legal title by an unimpeachable right as against all the world except the creditors, and the contingency does not affect his right to obtain an insurance on the property in his own name and for his own benefit. His insurable interest is perfect and complete. An insurance is a valid contract which he has the right to make, and the benefit which accrues to him from it can not be defeated by creditors on the ground that he holds the property by a title which in a certain contingency may be defeasible. The money received on the policy does not stand in the place of the property destroyed. It is in no proper or just sense the proceeds of the property. It is a sum paid by the insurer in consideration of a certain premium as an indemnity for the loss of the property in which the insured has a legal and insurable interest. This indemnity can not be taken away by setting up a contingent right or title in the property.[3]

RENTS AND PROFITS.— The grantee may also be charged with the rents and profits that have accrued from the property. *Et fructus non tantum qui percepti sunt verum etiam hi qui percipi potuerunt a fraudatore, veniunt. Partum quoque in hanc actionem venire, puto verius esse.*

[1] Clements v. Moore, 6 Wall. 299. [2] Steere v. Hoagland, 50 Ill. 377.
[3] Lerow v. Wilmarth, 91 Mass. 382; Nippe's Appeal, 75 Penn. 472; Bernheim v. Beer, 56 Miss. 149.

Præterea generaliter sciendum est ex hac actione restitutionem fieri opportere in pristinum statum, sive res fuerunt sive obligationes, ut perinde omnia revocentur ac si liberatio facta non esset. Propter quod etiam medii temporis commodum quod quis consequeretur liberatione non facta, præstandum erit dum usuræ non præstentur si in stipulatum deductæ non fuerunt; aut si talis contractus fuit in quo usuræ deberi potuerunt etiam non deductæ. Hæc actio post annum de eo quod ad eum pervenit adversus quem actio movetur, competit; iniquum enim prætor putavit, in lucro morari eum qui lucrum sensit ex fraude; id circo lucrum ei extorquendum putavit. Sive igitur ipse fraudator sit ad quem pervenit, sive alius quivis, competit actio in id quod ad eum pervenit, dolove malo ejus factum est quominus perveniret.[1] *Non solum autem ipsam rem alienatam restitui oportet, sed et fructus qui alienationis tempore terræ cohærent, quia in bonis fraudatoris fuerunt. Item eos qui post inchoatum judicium recepti sint. Medio autem tempore perceptos in restitutionem non venire.*[2] *Fructus autem fundo cohæsisse non satis intelligere se, Labeo ait, utrum duntaxat qui maturi an etiam qui immaturi fuerint, prætor significet. Cæterum etiam si de his senserit qui maturi fuerint, nihilo magis possessionem restitui oportere. Nam cum fundus alienaretur, quod ad eum fructusque ejus attineret, unam quandam rem fuisse, id est, fundum cujus omnis generis alienationem fructus sequi. Nec eum qui hyberno tempore habuerit fundum centum, si sub tempus messis, vindemiæve, fructus ejus vendere possit decem, id circo duas res, id est, fundum centum et fructus decem, eum habere intelligendum; sed unam, id est, fundum centum; sicut is quoque unam rem haberet qui separatim solum ædium vendere possit.*[3]

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[1] Dig. Lib. 42, tit. 9, §§ 20, 21, 24. [2] Dig. Lib. 42, tit. 9.
[3] Dig. Lib. 42, tit. 9.

From what Time Profits are Computed.—It certainly is not consonant with the principles of the law that the grantee should derive any advantage from his fraud. Consequently, he may be compelled to account for the profits from the time of the transfer.[1] An account may also be taken of what has been received as compensation for the use of the property.[2] The grantee should not be charged with the increased rent and profits arising from improvements made by him.[3]

The Amount.—When the grantee has merely received money on a voluntary bond he is only liable for the amount received.[4] If the grantee has merely received a loan, and is innocent of all fraud, he will only be compelled to pay the money at the time and in the manner he agreed to pay it to the debtor.[5] If the property consists of a policy of insurance on the life of the debtor, the grantee is liable for the money recovered upon the death of the debtor, and not merely for the amount of the premiums that were fraudulently paid.[6] But if the trans-

[1] Strike v. M'Donald, 2 H. & G. 191; s. c. 1 Bland, 57; Kipp v. Hanna, 2 Bland, 26; Mead v. Coombs, 19 N. J. Eq. 112; How v. Camp, Walk. Ch. 427; Alexander v. Todd, 1 Bond, 175; Marshall v. Croome, 66 Ala. 121; Janes v. McCleod, 61 Geo. 602; *vide* Sands v. Codwise, 4 Johns. 536; Robinson v. Stewart, 10 N. Y. 189; Bean v. Smith, 2 Mason, 252; Ringgold v. Waggoner, 14 Ark. 69; King v. Wilcox, 11 Paige, 589; Blow v. Maynard, 2 Leigh, 29; Higgins v. York Building Co., 2 Ark. 107; Croft v. Arthur, 3 Dessau. 223; Backhouse v. Jett, 1 Brock. 500; Pharis v. Leachman, 20 Ala. 662; Brown v. M'Donald, 1 Hill Ch. 297; Warner v. Blakeman, 4 Abb. App. 530; U. S. v. Griswold, 8 Fed. Rep. 556.

[2] Shields v. Anderson, 3 Leigh, 729. *Contra*, Simpson v. Simpson, 7 Humph. 275.

[3] King v. Wilcox, 11 Paige, 589.

[4] Hopkirk v. Randolph, 2 Brock. 132. [5] Weed v. Pierce, 9 Cow. 722.

[6] Stokes v. Coffey, 8 Bush, 533; Elliott's Appeal, 50 Penn. 75; *vide* Cole v. Marple, 98 Ill. 58.

fer of the policy was made while the debtor was solvent, the grantee is liable merely for the premiums paid after he became insolvent.[1] When the property is allowed to stand as indemnity for the amount paid by the grantee, he will be charged with interest on the excess above the real value from the day of the transfer.[2] When an assignment is set aside the assignee must account for property bought by him at sales under execution or mortgage, for the trust is valid against him.[3]

No Indemnity in Case of Actual Fraud.—*Si debitor in fraudem creditorum minore pretio fundum scienti emptori vendiderit; deinde hi quibus de revocando eo actio datur, eum petant; quæsitum est an pretium restituere debeant? Proculus existimat, omnimodò restituendum esse fundum etiam si pretium, non solvatur. Et rescriptum est secundum Proculi sententiam. Ex his colligi potest ne quidem portionem emptori reddendam ex pretio. Posse tamen dici, eam rem apud arbitrum ex causa animadvertendam ut si nummi soluti in bonis exstent, jubeat eos reddi; quia ea ratione nemo fraudetur.*[4]

A transfer tainted with actual fraud is absolutely void, although it is founded upon a valuable consideration. Such is the doctrine at law, and in cases of actual fraud equity follows the law and gives relief to the full extent to which a court of law would give relief. There is no instance of any reimbursement or indemnity afforded by a court of equity to a *particeps criminis* in a case of positive fraud. No right can be deduced from a fraudulent act. Every one who engages in a fraudulent scheme forfeits all

[1] Pullis v. Robison, 5 Mo. Ap. 549.
[2] Drury v. Cross, 7 Wall. 299; Wilson v. Horr, 15 Iowa, 489.
[3] Colburn v. Morton, 1 Abb. App. 378. [4] Dig. Lib. 42, § 14.

right to protection either at law or in equity. The law does not so far countenance fraudulent contracts as to protect the perpetrator to the extent of his investment. This doctrine is supported by every principle of morality and justice, as well as by the principles of sound policy. No party should be permitted to join in a conspiracy to cheat another with impunity. The law therefore will not permit the transfer to stand as a security for the amount paid to the debtor,[1] or for the sums subsequently paid to creditors,[2] even though he thereby pays off a mortgage,[3] or a debt contracted in the purchase of the property.[4] If the property assigned consist of a contract to erect a building, he cannot claim even what he paid for labor and materials in doing the work.[5] No allowance can be made to an assignee for his services under a fraudulent assignment,[6] or for the sum paid to counsel after the lien of the creditors had attached.[7]

No SET-OFF.—If the grantee is also a creditor, he can not set off his debt against the demand upon him for the

[1] M'Kee v. Gilchrist, 3 Watts, 230; Stovall v. Farmers' Bank, 16 Miss. 305; Holland v. Cruft, 37 Mass. 321; Sands v. Codwise, 4 Johns. 536; How v. Camp, Walk. Ch. 427; Pettibone v. Stevens, 15 Conn. 19; Moore v. Tarlton, 3 Ala. 444; Marriott v. Givens, 8 Ala. 694; Goodwin v. Hammond, 13 Cal. 168; Bibb v. Baker, 17 B. Mon. 292; Bleakley's Appeal, 66 Penn. 187; Miller v. Tolleson, Harp. Ch. 145; Brooks v. Caughran, 3 Head, 464; Allen v. Berry, 50 Mo. 90; Potter v. Stevens, 40 Mo. 229.

[2] Williamson v. Goodwyn, 9 Gratt. 503; Wood v. Hunt, 38 Barb. 302; Borland v. Walker, 7 Ala. 269; Bean v. Smith, 2 Mason, 252; Allen v. Berry, 50 Mo. 90.

[3] Pettus v. Smith, 4 Rich. Eq. 197; Wiley v. Knight, 27 Ala. 336; Railroad Co. v. Soutter, 13 Wall. 517; Thompson v. Bickford, 19 Minn. 17; *in re* Peter Mead, 19 N. B. R. 81.

[4] Sale v. McLean, 29 Ark. 612.

[5] Chapman v. Ransom, 44 Iowa, 377.

[6] Hastings v. Spencer, 1 Curt. 504; Brown v. Warren, 43 N. H. 430; *vide* Bishop v. Catlin, 28 Vt. 71. [7] Hastings v. Spencer, 1 Curt. 504.

property. As the transfer is void his title fails. He is deemed to have come by the property wrongfully, and to permit him to hold it by setting off his own debt against it would be giving effect to the transfer condemned by the law. It can not be done without a sacrifice of the principle. The doctrine of set-off is founded in natural justice, and never is applied to a case where the party comes by property wrongfully. He can no more be allowed his set-off against property acquired by a fraudulent deed than if he had acquired it tortiously.[1] In this respect it makes no difference whether the property remains *in specie* or has been converted into money,[2] or whether there is actual fraud, or the transfer is void on account of some provision contained in the deed.[3] In neither of these cases is a set-off allowed. Upon the same principle a creditor who has assented to a fraudulent assignment can not set off his claim against the proceeds

[1] Murray v. Riggs, 15 Johns. 571; s. c. 2 Johns. Ch. 565; Harris v. Sumner, 19 Mass. 129; Burtus v. Tisdall, 4 Barb. 571; Bean v. Smith, 2 Mason, 252; M'Kee v. Gilchrist, 3 Watts, 230; Wright v. Hancock, 3 Munf. 521; Thompson v. Drake, 3 B. Mon. 565; Wilson v. Horr, 15 Iowa, 489; Price v. Masterson, 35 Ala. 483; Foster v. Grigsby, 1 Bush, 86; Armstroug v. Tuttle, 34 Mo. 432; Miller v. Tolleson, Harp. Ch. 145; Fryer v. Bryan, 2 Hill Ch. 56; White v. Graves, 7 J. J. Marsh. 523; Garland v. Rives, 4 Rand. 282; Thompson v. Bickford, 19 Minn. 17; Salomon v. Moral, 53 How. Pr. 342; Thompson v. Pennel, 67 Me. 159; Hubbard v. Allen, 59 Ala. 283; Smith v. Craft, 12 Fed. Rep. 856; *vide* Goddard v. Hapgood, 25 Vt. 351; Bishop v. Catlin, 28 Vt. 71; Brown v. Warren, 43 N. H. 430.

[2] Thompson v. Bickford, 19 Minn. 17; Murray v. Riggs, 15 Johns. 571; s. c. 2 Johns. Ch. 565; M'Kee v. Gilchrist, 3 Watts, 230; Burtus v. Tisdall, 4 Barb. 571; Fryer v. Bryan, 2 Hill Ch. 56. *Contra*, Tubb v. Williams, 7 Hump. 367; Peacock v. Tompkins, Meigs, 317; Peters v. Cunningham, 10 Md. 554.

[3] Murray v. Riggs, 15 Johns. 571; s. c. 2 Johns. Ch. 565; Hone v. Heinriquez, 13 Wend. 240; s. c. 2 Edw. 120; Harris v. Sumner, 19 Mass. 129. *Contra*, Peters v. Cunningham, 10 Md. 554; Peacock v. Tompkins, Meigs, 317.

of property placed in his hands to sell as an auctioneer.[1] It has, however, been held that where a donee is also a creditor, he can not be disturbed in his possession without payment of his claim.[2] This is on account of his innocence, for no fraud either actual or constructive can be imputed to him, and in such a case his equity is equal to that of the other creditors.

Debt of Grantee.—A fraudulent judgment can not even be used as against other creditors to collect the amount that is due to the party to whom it is given.[3] A fraudulent transfer does not extinguish a debt due to the grantee, but as soon as it is set aside the debt becomes available, and the grantee is then entitled to share in the fund the same as any other creditor holding the same rank.[4]

Indemnity in Case of Constructive Fraud.—When a transfer is not tainted with actual fraud, but is fraudulent merely by construction of law, it will be allowed to stand as security for the money advanced by the grantee to the grantor,[5] or to pay off incumbrances,[6] or to pay the

[1] Hone v. Henriquez, 13 Wend. 240; s. c. 2 Edw. 120.

[2] Oliver v. Moore, 23 Ohio St. 473.

[3] Cleveland v. R. R. Co., 7 A. L. Reg. 536; Bunn v. Ahl, 29 Penn. 387.

[4] Robinson v. Stewart, 10 N. Y. 189; Dickinson v. Way, 3 Rich. Eq. 412; Murray v. Riggs, 15 Johns. 571; s. c. 2 Johns. Ch. 565; Johnston v. Bank, 3 Strobh. Eq. 263; Yoder v. Standiford, 7 Mon. 478.

[5] Alley v. Connell, 3 Head, 578; Wood v. Goff, 7 Bush, 59; Dohoney v. Dohoney, 7 Bush, 217; M'Meekin v. Edmonds, 1 Hill Ch. 288; Herschfeldt v. George, 6 Mich. 456; Tripp v. Vincent, 8 Paige, 176; Neuffer v. Pardue, 3 Sneed, 191; Weeden v. Hawes, 13 Conn. 50; Sanford v. Wheeler, 13 Conn. 165; Short v. Tinsley, 1 Met. (Ky.) 397; Scouton v. Bender, 3 How. Pr. 185; Anderson v. Fuller, 1 McMullan Ch. 27; Clements v. Moore, 6 Wall. 299; Drury v. Cross, 7 Wall. 299; Brown v. McDonald, 1 Hill Ch. 297; Parker v. Holmes, 2 Hill Ch. 93; Turbeville v. Gibson, 8 Heisk. 565.

[6] Potter v. Gracie, 58 Ala. 303.

grantor's debts.[1] This is especially true when a conveyance is set aside in equity on the ground that it is partially voluntary,[2] or of such a suspicious character that it will not do to let it stand, while the proof will not warrant the court in setting it aside altogether.[3] An innocent grantee is entitled to indemnity for advances made by him to the debtor even after the recovery of a judgment against the grantor which was a lien on the property, for the lien did not divest the title.[4] The grantee of property which has been partially paid for by the debtor may be allowed for all payments made by him, for in such a case he is substituted to the rights of the vendor, whose title he took.[5] Where the vendor of property, the title to which is taken in the name of another, acts in good faith, he may claim the portion of the purchase money that remains unpaid.[6] If the grantee held the possession of the property, the rents and profits will be deemed equivalent to the interest on his money,[7] or deducted from the amount to be refunded to him.[8] An innocent grantee may

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[1] Pond v. Comstock, 27 N. Y. Supr. 492.

[2] College v. Powell, 12 Gratt. 372; Worthington v. Bullitt, 6 Md. 172; s. c. 3 Md. Ch. 99; Crumbaugh v. Kugler, 2 Ohio St. 373; Herschfeldt v. George, 6 Mich. 456; Church v. Chapin, 35 Vt. 223; Corlett v. Radcliffe, 14 Moore P. C. 121; Spalding v. Norman, 51 N. Y. 672; First Nat'l Bank v. Birtsehy, 52 Wis. 438.

[3] Boyd v. Dunlap, 1 Johns. Ch. 478; Bigelow v. Ayrault, 46 Barb. 143; Herne v. Meeres, 1 Vern. 465; s. c. 2 Bro. C. C. 177, n.; Clements v. Moore, 6 Wall. 299; Bean v. Smith, 2 Mason, 252; Doughten v. Gray, 10 N. J. Eq. 323; Glass v. Farmer, 10 Heisk. 551; Tompkins v. Sprout, 55 Cal. 31; Roche v. Hassard, 5 Ir. Ch. 14.

[4] Henderson v. Hunton, 26 Gratt. 926.

[5] Gardiner Bank v. Wheaton, 8 Me. 373; Ogle v. Lichleberger, 1 A. L. Reg. 121; Ford v. Johnston, 14 N. Y. Supr. 563.

[6] Highland v. Highland, 5 W. Va. 63.

[7] Brown v. M'Donald, 1 Hill Ch. 297.

[8] Gardiner Bank v. Wheaton, 8 Me. 373.

also be allowed a compensation for his services.[1] An innocent purchaser who contracts to pay the value of the property in the support of the grantor is entitled to indemnity for disbursements made before the deed is impeached.[2]

PARTNER.—A partner who accepts a fraudulent transfer of the partnership property from his copartner may be remitted to his lien as a partner, and thus secured in all his real advances for the firm.[3]

FEME COVERT.—If a *feme covert* participates in the fraud of her husband in a conveyance, the consideration of which is the relinquishment of her right of dower, the fraud by reason of her coverture can not be imputed to her, and the transfer will stand as security for her dower.[4] Although she has received a voluntary conveyance from her husband, yet if she has sold the property and spent the proceeds she is not liable to his creditors, for the presumption is that she spent it at the dictation of her husband.[5]

EXPENDITURES.—When the transfer is tainted with actual fraud, no allowance can be made for improvements.[6]

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[1] Brown v. M'Donald, 1 Hill Ch. 297; Gardiner Bank v. Wheaton, 8 Me. 373.

[2] Henderson v. Hunton, 26 Gratt. 926.

[3] Thompson v. Drake, 3 B. Mon. 565.

[4] Blanton v. Taylor, Gilmer, 209; Quarles v. Lacy, 4 Munf. 251; College v. Powell, 12 Gratt. 372; Taylor v. Moore, 2 Raud, 563; Ward v. Crotty, 4 Met. (Ky.) 59.

[5] Phipps v. Sedgwick, 95 U. S. 3; s. c. 12 Blatch. 163; s. c. 5 Ben. 184; s. c. 5 N. B. R. 168; s. c. 10 N. B. R. 28.

[6] Strike v. M'Donald, 2 H. & G. 191; s. c. 1 Bland, 57; High v. Nelms, 14 Ala. 350; Auble v. Mason, 35 Penn. 261; *in re* Peter Mead, 19 N. B. R. 81; *vide* How v. Camp, Walk. Ch. 247; King v. Wilcox, 11 Paige, 589.

It would seem, however, to be just and reasonable to allow expenditures as an offset to rents and profits,[1] especially when they have been made to pay taxes.[2] *Sed cum aliquo modo, scilicet ut sumptus facti deducantur; nam arbitrio judicis non prius cogendus est rem restituere quam si impensas necessarias consequatur. Idemque erit probandum et si quis alius sumptus ex voluntate fidejussorum creditorumque fecerit.*[3] A donee who has taken possession and made improvements under a parol promise of a gift is entitled to compensation for the improvements.[4] An assignee claiming under a voluntary assignment which is fraudulent only by construction of law, is allowed all his necessary expenses and disbursements in collecting the debts or converting the property into money,[5] or paying off prior liens.[6]

APPORTIONMENT.—The whole amount in the hands of the grantee may be appropriated to the payment of the debts, although there may be other persons equally liable,[7] for the creditor is not bound to apportion his debt among the various grantees. But where all the grantees are convened, and all the materials for an apportionment are before the court, the demand will be apportioned among

[1] Croft v. Arthur, 3 Dessau. 223; Rucker v. Abell, 8 B. Mon. 566; Byers v. Fowler, 12 Ark. 218; *vide* Strike v. M'Donald, 2 H. & G. 191; s. c. 1 Bland, 57.

[2] How v. Camp, Walk. Ch. 427; King v. Wilcox, 11 Paige, 589; *vide* Strike v. M'Donald, 2 H. & G. 191; s. c. 1 Bland, 57.

[3] Dig. Lib. 42, tit. 9, § 20.

[4] Rucker v. Abell, 8 B. Mon. 566.

[5] Strong v. Skinner, 1 Barb. 546; Bishop v. Catlin, 28 Vt. 71; Brown v. Warren, 43 N. H. 430; Therasson v. Hickok, 37 Vt. 454; Colburn v. Morton, 1 Abb. App. 378.

[6] Colburn v. Morton, 1 Abb. App. 378.

[7] Hopkirk v. Randolph, 2 Brock. 132; Van Wyck v. Seward, 18 Wend. 375; s. c. 6 Paige, 62; s. c. 1 Edw. 327.

the responsible parties, if it can be done without any material delay or injury to the creditor. This will be done, however, with a reservation of the right to the creditor to resort for satisfaction to all the parties responsible to him to the full extent of their liabilities respectively in the event of his failing, from insolvency or any other cause, to procure satisfaction from any of the parties of their due proportion of his demand.[1]

EXEMPT PROPERTY.—If the property is exempt absolutely and unconditionally from execution, the grantee may retain it, for a fraudulent conveyance does not enlarge the rights of the creditors, but leaves them to enforce their rights as if no conveyance had been made. If they insist that the property still belongs to the debtor, they can only sell the same right as if he were the actual owner. Consequently, they must sell it subject to the right to an exemption which the grantee may claim.[2] He has all the powers of an owner to defend his property. He may defend his possession[3] against a purchaser under an execution, or institute an action of replevin against a constable who has levied on the property,[4] or file a bill in equity against creditors who have seized it,[5] or maintain

[1] Chamberlayne v. Temple, 2 Rand. 384; Brice v. Myers, 5 Ohio 121; Cornish v. Clark, L. R. 14 Eq. 184.

[2] Danforth v. Beattie, 43 Vt. 138; Kuevan v. Specker, 11 Bush, 1; Castle v. Palmer, 88 Mass. 401; Martel v. Somers, 26 Tex. 551; Youmans v. Boomhower, 3 T. & C. 21; Whiting v. Barrett, 7 Lans. 106; Lichy v. Ferry, 6 Bush, 315; Crummen v. Bennett, 68 N. C. 494; Hibben v. Soyer, 23 Wis. 319; Chrisman v. Roberts, 68 Penn. 308; Rayner v. Whicher, 88 Mass. 292; Pennington v. Seal, 49 Miss. 518; Keating v. Keefer, 5 N. B. R. 133; s. c. 4 A. L. T. 162; Leupold v. Krause, 95 Ill. 440; Kehr v. Smith, 7 N. B. R. 97; s. c. 10 N. B. R. 49; s. c. 2 Dill. 50; s. c. 20 Wall. 31.

[3] Wood v. Chambers, 20 Tex. 247.

[4] Bond v. Seymour, 1 Chand. 40; s. c. 2 Pinney, 105.

[5] Smith v. Allen, 39 Miss. 469.

an action of trover[1] or trespass[2] against them for the seizure. If the property, however, is exempt only conditionally while the debtor owns it, the right to the exemption ceases with the conveyance, and the grantee can not claim it.[3] If the exemption is only allowed upon the claim of the debtor, the grantee can not claim it.[4] If the property is exempt only during the lifetime of the debtor, the grantee can not claim the exemption after the debtor's death.[5]

DOWER.—If the conveyance is set aside the grantee can not retain the dower interest of the grantor's wife.[6]

SURPLUS.—The surplus which may remain after the payment of the debt and costs belongs to the grantee.[7] If the conveyance is voluntary the donee is entitled to an assignment of the creditor's claim upon paying the amount thereof.[8]

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[1] Foster v. McGregor, 11 Vt. 595.

[2] Anthony v. Wade, 1 Bush. 110.

[3] Piper v. Johnston, 12 Minn. 60; Chambers v. Sallie, 29 Ark. 407.

[4] Getzler v. Saroni, 18 Ill. 511; Herschfeldt v. George, 6 Mich. 456; Edmondson v. Hyde, 7 N. B. R. 1; s. c. 2 Saw. 205.

[5] Fellows v. Lewis, 65 Ala. 343. [6] Lockett v. James, 8 Bush. 28.

[7] Wood v. Hunt, 38 Barb. 302; Burtch v. Elliott, 3 Ind. 99; King v. Tharp, 26 Iowa, 283; Allen v. Trustees, 102 Mass. 262; Freeman v. Burnham, 36 Conn. 469; Norton v. Norton, 59 Mass. 524; Bostwick v. Menck, 40 N. Y. 383; Pratt v. Cox, 22 Gratt. 330; Orr v. Gilmore, 7 Lans. 345; Todd v. Neal, 49 Ala. 266; Ford v. Johnston, 14 N. Y. Supr. 563; Van Wyck v. Baker, 17 N. Y. Supr. 39; Kerr v. Hutchins, 46 Tex. 384.

[8] Cole v. Malcolm, 66 N. Y. 363.

CASES FROM THE YEAR BOOKS.

En briefe de Det port vers deux execut's J. B. les queux dionț per Horton, que le dit J. B. en sa vie doner touts ses biens a eux y un fait q'ils monstre avant san c' q'ils averont l'admistrac' des aut's biens, etc., judgem't si acc'. Trem. mesme cel done fuit fait y fraude et colluss' pur ouster no' et aut's as queux il fuit dettor de nostr' action prist, etc., per q' nous priom' nr'e det. Horton dist q' le done fuit fait bona fide sans ascun tiel, etc., prist & sic ad patriam quod nota.—13 *Henry* IV, *f.* 4.

En un bill de trespass dun chival et iiij. vach a tort prises, etc., port vers T. de W. et R. de N. Les queux plede de rien culp: trove fuit y Enquest, que le dit R. avoit rec' vers J. B. rrs, en la Court de P., per que le dit T. come baily, etc., prist mesms les vaches en nosm dexec. et les livera a mesm cesty R. et amesna a chastel de P. Et oustr' ils dis. que mesms les bestes fur' les bestes le dit J. B. jour de judgment rendu; mes il les dona puis y fait a mesm cesty qui ore se pl' y fraud a delaier l'exec. Et ils fur' opposez de la Court a dire qui prist les profits de mesms les bestes en le mean temps. Qui dis. Sir, le donor. Thorp; jeo enten ceo don de nul valu, et jeo tien q' ce'y a qui tiel don fuit fait les fist fors gardein des bestes al' oepz l'autre' quia fraus & dolus, &c. Car autrement en aur' jamais homc exec. des chat'; y q' prenes rien y vostre bill.—*Li. As.* 101, *f.* 72.

CASES FROM THE YEAR BOOKS.

TRANSLATION.

In a writ for debt brought against two executors of J. B., they say by Horton that the said J. B., in his life, gave them all his property, by a deed of which they make profert without their having the administration of the other property. Judgment *si actio.*

Trem. This same gift was made fraudulently and collusively to oust us and others, to whom he was a debtor, from our action. Ready, etc. Wherefore we pray for our debt.

Horton says that the gift was made in good faith without any such, etc. Ready, and so to the country, *quod nota.*

In a bill for trespass for one horse and four cows tortiously seized, &c., brought against T. of W. and R. of N., who plead not guilty: it was found by inquest that the said R. had recovered against J. B. rrs. in the court of P., on authority of which the said T., as bailiff, etc., took the said cows in execution and delivered them to R. and carried them to the castle of P. Furthermore, they say that the said beasts were the beasts of the said J. B. on the day when the judgment was rendered, but he gave them afterwards by deed to him who is now plaintiff fraudulently to delay execution. And they were interrogated by the court as to this point: who received the profits of the beasts in the mean time? They said, Sir, the donor.

Thorpe. I consider the gift null and void, and hold that he to whom such a gift was made became only keeper of the beasts for the use of the other, because fraud and deceit, &c. For otherwise a man would never have execution on chattels; wherefore take nothing by your bill.

En le chancery un bill fuit abatu pur non suffic. del matter, et le pl' dit q' cel bill fuit misconceive; mes il mr'a pur son matter q. J. B. que est jades baron le def. achata del pere le pl' q' execut' il est a Brig, certein bn's al value de C marks, etc. Et puis m' cestuy J. B. vient en Engleterre et p' defraudr' son dettor fist un done de ses bn's a un tiel, etc., mes il continua, son possess. et prist Westm. et morust, et ses bn's continua en le poss. la feme, etc., et puis el pris m' cestuy q' est supp' destre def. al barron, et ala en Lond; et emport m' le bn's ove luy et est seisie et poss. de eux, etc., le quel matter, &c. Et priom' q' il rn'd a cel matter et bill, et il aver copy de ceo et issint agard le court, quod nota, &c.—16 *Edw.* IV, *folio* 9.

Scire facias des dam's recouer' le vicont ret' quele defendant au' vend ces chateaux en fraude de tolt' lexecucion. ↄ Scroop: home puit bien auer vendu ces chateaux cy bien apres jugement come deuaunt sauns ce que exec' se fra deux chateaux.—*Fitzherbert's Abdgt., Execution, pl.* 108.

ↄ Det y Belk. si home recouera dam' et le defendant alien ses bn's y fraude la issue poet estre prise s' c' et si soit troue le pl' au'a executio del bn's alien y fraud qd non negat.—*Brook's Abr., Collusion, pl.* 9.

In chancery a bill was dismissed as insufficient in substance, and the plaintiff said that the bill was misconceived, but he showed for his substance that J. B., who was the former husband of the defendant, bought of the plaintiff's father, whose executor he is at Brig, certain property, of the value of one hundred marks, &c. And afterwards the same J. B. came to England, and to defraud his creditors made a gift of his property to a certain person, &c., but he continued his possession and took refuge at Westminster and died, and his property continued in the possession of his wife, &c., and afterwards she married the person who is supposed to be defendant, and went to London and took the said property with her, and is seized and possessed of it, &c., which substance, &c. And we pray that he make answer to this matter and bill, and that he have copy of it, and thus the court awarded, *quod nota*, &c.

Scire facias for damages recovered. The sheriff returns that the defendant had fraudulently sold the chattels to prevent execution.

Scroop. These chattels might very well have been sold as well after judgment as before, provided that execution on the chattels had not already issued.

Debt by Belk. If a man recover damages, and the defendant alienate his goods fraudulently, the issue may be taken on that, and, if it be found, the plaintiff can have execution on the goods fraudulently alienated; *quod non negat.*

APPENDIX.

STATUTES OF THE VARIOUS STATES.

ENGLAND.

50 E. III, Cap. 6.

Item. Because that divers people inherit of divers tenements, borrowing divers goods in money or in merchandise of divers people of this realm, do give their tenements and chattels to their friends, by collusion thereof to have the profits at their will, and after do flee to the franchise of *Westminster*, of *St. Martin le Grand*, of *London*, or other such privileged places, and there do live a great time with an high countenance of another man's goods, and profits of the said tenements and chattels, till the said creditors shall be bound to take a small parcel of their debt, and release the remnant; it is ordained and assented, that if it be found that such gifts be so made by collusion, that the said creditors shall have execution of the said tenements and chattels as if no such gift had been made.

3 H. VII. Cap. 4.

Item. That where oftentimes deeds of gifts of goods and chattels have been made, to the intent to defraud their creditors of their duties, and that the person or persons that maketh the said deed of gift goeth to the sanctuary, or other places privileged, and occupieth and liveth with the said goods and chattels, their creditors being unpaid; it is ordained, enacted and established

by the assent of the Lords Spiritual and Temporal, and at the request of the Commons in the said Parliament assembled, and by the authority of the same, that all deeds of gift of goods and chattels made or to be made of trust, to the use of that person or persons that made the same deed or gift, be void and of none effect.

13 Eliz., Cap. 5.

For the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements, as of goods and chattels, more commonly used and practised in these days, than has been seen or heard of heretofore; which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, have been, and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued:

II. Be it therefore declared, ordained and enacted by the authority of this present Parliament, that all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or any of them, or of any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise; and all and every bond, suit, judgment and execution, at any time had or made sithence the beginning of the Queen's Majesty's reign that now is, or at any time hereafter to be had or made, to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages,

penalties, forfeitures, heriots, mortuaries and reliefs, by such guileful, covinous or fraudulent devices and practices as is aforesaid, are, shall or might be in any wise disturbed, hindered, delayed, or defrauded), to be clearly and utterly void, frustrate and of none effect; any pretence, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

III. And be it further enacted by the authority aforesaid, that all and every the parties to such feigned, covinous, or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, and other things before expressed, and being privy and knowing of the same, or any of them, which at any time after the tenth day of June next coming, shall wittingly and willingly put in use, avow, maintain, justify, or defend the same, or any of them, as true, simple, and done, had or made *bona fide*, and upon good consideration; or shall alien, or assign any the lands, tenements, goods, leases, or other things before mentioned, to him or them conveyed, as is aforesaid, or any part thereof, shall incur the penalty and forfeiture of one year's value of the said lands, tenements, and hereditaments, leases, rents, commons, or other profits, of or out of the same; and the whole value of said goods and chattels, and also so much money as are or shall be contained in any such covinous and feigned bond; one moiety whereof to be the Queen's Majesty, her heirs and successors, and the other moiety to the party or parties grieved by such feigned and fraudulent feoffment, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, leases, rents, commons, profits, charges, and other things aforesaid, to be recovered in any of the Queen's Courts of Record, by action of debt, bill, plaint, or information, wherein no essoin, protection, or wager of law shall be admitted for the defendant or defendants; and also being thereof lawfully convicted, shall suffer imprisonment for one half year without bail or mainprise.

VI. Provided also, and it be enacted by the authority aforesaid, that this act, or anything therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods, or chattels, had, made,

conveyed or assured, or hereafter to be had, made, conveyed, or assured; which estate or interest is, or shall be upon good consideration, and *bona fide* lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud, or collusion, as is aforesaid; anything before mentioned to the contrary hereof notwithstanding.

VII. This Act to endure unto the end of the first session of the next Parliament.

NOTE.—This Act was made perpetual by 29 Eliz. cap. 5.

ALABAMA.

§ 1861. All deeds of gift, all conveyances, transfers and assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, are void against creditors, existing or subsequent, of such person.

§ 1865. All conveyances or assignments, in writing or otherwise, of any estate or interest in real or personal property, and every charge upon the same, made with intent to hinder, delay or defraud creditors, purchasers, or other persons, of their lawful suits, damages, forfeitures, debts or demands; and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent, against the persons who are or may be so hindered, delayed or defrauded, their heirs, personal representatives and assigns, are void.—*Chap.* 4, *Article* 1, *Code of Alabama.*

ARKANSAS.

§ 2953. Every deed of gift and conveyance of goods and chattels in trust to the use of the person so making such deed of gift or conveyance, is declared to be void as against creditors existing and subsequent purchasers.

§ 2954. Every conveyance or assignment, in writing or otherwise of any estate or interest in lands, or in goods and

chattels, or things in action, or of any rents issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents and profits thereof, and every bond, suit, judgment, decree, or execution made or contrived with the intent to hinder, delay, or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts, or demands, as against creditors and purchasers prior and subsequent, shall be void.

§ 2959. This act shall not extend to any estate or interest in any lands or tenements, goods or chattels, or any rents or profits out of the same, which shall be upon a valuable consideration and *bona fide* and lawfully conveyed; nor shall this act be construed to avoid any deed or sale to a subsequent *bona fide* purchaser from the grantee for valuable consideration and without any notice of fraud.—*Chap.* 62, *Revised Statutes of Arkansas.*

CALIFORNIA.

3439. Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves, in trust for the benefit of others than the debtor.

3440. Every transfer of personal property other than a thing in action, or a ship or a cargo at sea or in a foreign port, and every lien thereon other than a mortgage, when allowed by law, and a contract of bottomry or respondentia is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors, while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbrancers, in good faith, subsequent to the transfer.

3441. A creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement by legal process of his right to take the property affected by the transfer or obligation.

3442. In all cases arising under section 1227, or under the provisions of this title, except as otherwise provided in section 3440, the question of fraudulent intent is one of fact and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration.—*California Civil Code, Part* II, *Title* II.

CONNECTICUT.

SEC. 1. All fraudulent conveyances, suits, judgments, executions or contracts made or contrived with intent to avoid any debt or duty belonging to others shall, notwithstanding any pretended consideration therefor, be void as against those persons only, their heirs, executors, administrators or assigns, to whom such debts or duty belongs.

SEC. 2. Any party to any such fraudulent proceeding who shall wittingly justify the same as being made in good faith and on good consideration shall forfeit one year's value of any real estate, and the whole value of any personal estate conveyed, changed or contracted for thereby, half to the party aggrieved who shall sue for the same, and half to the State.—*General Statutes of Connecticut, Title* 18, *Chap.* 3.

DELAWARE.

SEC. 4. No sale, whether with or without bill of sale, of any goods or chattels within this State, shall be good in law, except as against the vendor, or shall change or alter the property in such goods or chattels, unless a valuable consideration for the same shall be paid, and unless the goods and chattels sold shall be actually delivered into the possession of the vendee as soon as conveniently may be after the making of such sale.—*Revised Code of Delaware, Title* 9, *Chap.* 43.

FLORIDA.

§ 1. Every feoffment, gift, grant, alienation, bargain, sale, conveyance, transfer and assignment of lands, tenements, hereditaments and other goods and chattels, or any of them, or any lease, rent, use, common or other profit, benefit or charge whatever, out of lands, tenements, hereditaments, or other goods and chattels, or any of them, by writing or otherwise, and every bond, note, contract, suit, judgment and execution, which shall at any time hereafter be had, made or executed, contrived or devised, of fraud, covin, collusion or guile, to the end, purpose or intent to delay, hinder or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, demands, penalties or forfeitures, shall be from henceforth, as against the person or persons, or body politic or corporate, his, her or their heirs, successors, executors, administrators and assigns, and every of them so intended to be delayed, hindered or defrauded, deemed, held, adjudged and taken, to be utterly void, frustrate and of none effect; any pretence, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding:

Provided, That the foregoing section of this act, or anything therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, uses, commons, profits, goods or chattels, which shall be had, made, conveyed or assured, if such estate or interest shall be upon good consideration, and *bona fide*, lawfully conveyed or assured to any person or persons, body politic or corporate, not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud or collusion, as aforesaid, anything in the said section to the contrary notwithstanding.—*Chap.* 27, *Bush's Digest of the Statute Law of Florida.*

GEORGIA.

§ 1942. The following acts by debtors shall be fraudulent in law against creditors, and as to them null and void, viz:

1. [Every assignment or transfer by a debtor, insolvent at the time, of real or personal property, or choses in action of any

description to any person, either in trust or for the benefit of, or in behalf of creditors, where any trust or benefit is reserved to the assignor or any person for him.]

2. Every conveyance of real or personal estate, by writing or otherwise, and every bond, suit, judgment and execution, or contract of any description, had or made with intention to delay or defraud creditors, and such intention known to the party taking; a *bona fide* transaction on a valuable consideration, and without notice or grounds for reasonable suspicion shall be valid.

Every voluntary deed or conveyance, not for a valuable consideration, made by a debtor insolvent at the time of such conveyance.

§ 1943. A debtor may prefer one creditor to another, and to that end he may *bona fide* give a lien by mortgage or other legal means, or he may sell in payment of the debt, or he may transfer negotiable papers as collateral security, the surplus in such cases not being reserved for his own benefit or that of any other favored creditor, to the exclusion of other creditors.—*Article* II, *Code of Georgia*, 1868.

ILLINOIS.

§ 4. Every gift, grant, conveyance, assignment or transfer of, or charge upon any estate, real or personal, or right or thing in action, or any rent or profit thereof, made with the intent to disturb, delay, hinder or defraud creditors or other persons, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered with like intent, shall be void as against such creditors, purchasers, or other persons.

§ 5. The foregoing section shall not affect the title of a purchaser for a valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.

§ 8. This act shall not extend to any estate, or interest in any lands, goods or chattels, or any rents, common or profit out of the same, which shall be upon good consideration and *bona fide* lawfully conveyed or assured to any person, bodies politic or corporate.—*Revised Statutes of Illinois, Chap.* 59.

INDIANA.

§ VIII. Every sale made by a vendor of goods in his possession, or under his control, unless the same be accompanied by immediate delivery, and be followed by an actual change of the possession of the things sold, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or subsequent purchasers in good faith, unless it shall be made to appear that the same was made in good faith, and without any intent to defraud such creditors or purchasers.

§ IX. The term "creditors" as used in the last section shall be construed to include all persons who shall be creditors of the vendor or assignor, at any time whilst such goods were in his possession or under his control.

§ XVII. All conveyances or assignments, in writing or otherwise, of any estate in lands, or of goods, or things in action, every charge upon lands, goods, or things in action, and all bonds, contracts, evidences of debt, judgments, decrees, made or suffered with the intent to hinder, delay, or defraud creditors, or other persons of their lawful damages, forfeitures, debts or demands, shall be void as to the person sought to be defrauded.

§ XVIII. All deeds of gift, conveyances, transfers, or assignments, verbal or written, of goods or things in action, made in trust for the use of the person making the same, shall be void as against creditors, existing or subsequent, of such person.

§ XIX. Every conveyance, charge, instrument, act or proceeding, declared by the provisions of this act to be void, as against creditors or purchasers, shall be void against the heirs, personal representatives or assignees of such creditors or purchasers.

§ XX. The provisions of this act shall not be construed to affect the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor or assignor, or of the fraud rendering void the title of such grantor or assignor.

§ XXI. The question of fraudulent intent, in all cases arising under the provisions of this act, shall be deemed a question of fact, nor shall any conveyance or charge be adjudged fraudulent,

as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration.—*Chap.* 66, *Statutes of Indiana.*

KANSAS.

Be it enacted by the Legislature of the State of Kansas:

§ 1. All gifts and conveyances of goods and chattels, made in trust to the use of the person or persons making the same, shall be void and of no effect.

§ 2. Every gift, grant, or conveyance of lands, tenements, hereditaments, rents, goods, or chattels, and every bond, judgment, or execution, made or obtained, with intent to hinder, delay, or defraud creditors of their just and lawful debts or damages, or to defraud, or to deceive the person or persons who shall purchase such lands, tenements, hereditaments, rents, goods, or chattels, shall be deemed utterly void and of no effect.

§ 3. Every sale or conveyance of personal property unaccompanied by an actual and continued change of possession, shall be deemed to be void as against purchasers without notice and existing or subsequent creditors, until it is shown that such sale was made in good faith and upon sufficient consideration. This section shall not interfere with the provisions of law relating to chattel mortgages.—*Chapter* 43, *General Statutes of Kansas*, 1868.

KENTUCKY.

§ 1. Every gift, conveyance, assignment or transfer of, or charge upon any estate, real or personal, or right or thing in action, or any rent or profit thereof made with the intent to delay, hinder or defraud creditors, purchasers or other persons, and every bond or other evidence of debt given, action commenced, judgment suffered, with like intent, shall be void as against such creditors, purchasers, and other persons.

This section shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.

§ 2. Every gift, conveyance, assignment, transfer or charge made by a debtor of or upon any of his estate, without valuable consideration therefor, shall be void as to all his then existing liabilities, but shall not, on that account alone, be void as to creditors whose debts or demands are thereafter contracted, nor as to purchasers with notice of the voluntary alienation or charge; and though it be adjudged to be void as to a prior creditor, it shall not therefore be decreed to be void as to such subsequent creditors or purchasers.—*Chap.* 4, *General Statutes of Kentucky.*

MICHIGAN.

§ 4697. All deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person.

§ 4703. Every sale made by a vendor, of goods and chattels in his possession or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith, and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the persons claiming under such sale or assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers.—*Chap.* 81. *Revised Statutes of Michigan.*

§ 4713. Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of any rents or profits issuing therefrom, and any charge upon lands, goods or things in action, or upon the rents and profits thereof, made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence

of debt given, suit commenced, decree or judgment suffered, with like intent as against the persons so hindered, delayed or defrauded, shall be void.

§ 4715. Every conveyance, charge, instrument or proceeding, declared by law to be void as against creditors or purchasers, shall be equally void as against the heirs, successors, personal representatives or assigns of such creditors and purchasers.

§ 4716. The question of fraudulent intent, in all cases arising under this, or either of the last two preceding chapters, shall be deemed a question of fact, and not of law.

§ 4717. None of the provisions of this, or the last two preceding chapters, shall be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that he had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.

MINNESOTA.

§ 14. All deeds of gifts, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the creditors existing or subsequent of such person.

§ 15. Every sale made by a vendor of goods and chattels in his possession or made under his control, and every assignment of goods and chattels, unless the same is accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor or assignor, or subsequent purchasers in good faith, unless those claiming under such sale or assignment make it appear that the same was made in good faith and without any intent to hinder, delay, or defraud such creditors or purchasers.

§ 16. The term "creditors" as used in the preceding section, includes all persons who are creditors of the vendor or assignee, at any time while such goods and chattels remain in his possession or under his control.

§ 17. Nothing contained in the two preceding sections shall apply to contracts of bottomry or respondentia, nor assignments or hypothecations of vessels or goods at sea, or in foreign ports, or without this State: *provided* the assignee or mortgagee takes possession of such vessel or goods as soon as possible, after the arrival thereof within this State.

§ 18. Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or of any rents or profits issuing therefrom, and every charge upon lands or upon the rents or profits thereof, made with the intent to hinder, delay, or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, actions commenced, order or judgment suffered, with the like intent as against the persons so hindered, delayed or defrauded, shall be void.

§ 19. Every conveyance, charge, instrument, or proceeding declared to be void by the provisions of this and the two preceding titles, as against creditors or purchasers, shall be equally void against the heirs, successors, personal representatives, or assignees of such creditors or purchasers.

§ 20. The question of fraudulent intent in all cases, arising under the provisions of this title shall be deemed a question of fact and not of law, and no conveyance or charge shall be adjudged fraudulent as against creditors solely on the ground that it was not founded on a valuable consideration.

§ 21. The provisions of this title shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration unless it appears that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or the fraud rendering void the title of such grantor.

§ 22. The term "conveyance," as used in this chapter, shall be construed to embrace every instrument in writing, except a last will and testament, whatever may be its form, and by whatever name it may be known in law, by which any estate or interest in lands is created, aliened, assigned, or surrendered.—*Chap.* 41, *Tit.* 3, *page* 335, *Minnesota Revised Statutes*, 1866.

MISSISSIPPI.

§ 2983. Every gift, grant or conveyance of land, goods or chattels, or of any rent, common, or other profit or charge, out of the same, by writing or otherwise, and every bond, suit, judgment or execution had or made and contrived of malice, fraud, covin, collusion or guile, to the intent or purpose to delay, hinder or defraud creditors of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures, or to defraud or deceive those who shall purchase the same land, or any rent, profit or commodity out of it, shall be from henceforth deemed and taken only as against the person or persons, his, her or their heirs, successors, executors, administrators or assigns, and every one of them, whose debts, suits, demands, estates, or interests by such guileful and covinous devices and practices as aforesaid shall or might be in any wise disturbed, hindered, delayed or defrauded, to be clearly and utterly void, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding; and, moreover, if any conveyance be of goods or chattels, and be not on consideration deemed valuable in law, it shall be taken to be fraudulent within this act unless the same be by will duly proved and recorded, or by writing acknowledged or proved; and such writing, if the same be for real estate, shall be acknowledged or proved and recorded in the county where the land conveyed is situated; and if for personal property, then in the county where the donee shall reside or the property shall be; and the proof or acknowledgment in either case shall be taken or made and certified in the same manner as conveyances of land are by law directed to be acknowledged or proved and recorded, unless, in the case of personal property, possession shall really and *bona fide* remain with the donee; and, in like manner, where any loan of goods and chattels shall be pretended to have been made to any person with whom, or those claiming under him, possession shall have remained for the space of three years without demand made and pursued by due course of law on the part of the pretended lender, or where any reservation or limitation shall be pretended to have been made of a use or property by way of condition, reversion, remainder,

or otherwise, in goods or chattels, the possession whereof shall have remained in another, as aforesaid, the same shall be taken, as to the creditors and purchasers of the persons aforesaid so remaining in possession, to be fraudulent within this article, and that the absolute property is with the possession unless such loan, reservation or limitation of use or property were declared by will or by writing proved or acknowledged and recorded as aforesaid.

§ 2894. This act shall not extend to any estate or interest in any lands, goods or chattels, or any rents, common or profit out of the same, which shall be upon good consideration and *bona fide* lawfully conveyed or assured to any person or persons, bodies politic or corporate; nor shall it in any case extend to creditors whose debts were contracted after such fraudulent act, unless made with intent to defraud them; and though a conveyance or contract be decreed void as to prior creditors, it shall not on that account be void as to subsequent creditors or purchasers. —*Revised Code of Mississippi, Chap.* 60.

MISSOURI.

§ 1. Every deed of gift and conveyance of goods and chattels in trust, to the use of the person so making such deed of gift or conveyance, is declared to be void as against creditors existing and subsequent, and purchasers.

§ 2. Every conveyance or assignment in writing or otherwise, of any estate or interest in lands, or in goods and chattels, or in things in action, or of any rents and profits issuing therefrom, and every charge upon lands, goods or things in action, or upon the rents and profits thereof, and every bond, suit, judgment, decree or execution, made or contrived with the intent to hinder, delay or defraud creditors of their lawful actions, damages, forfeitures, debts or demands (or to defraud or deceive those who shall purchase the same lands, tenements, hereditaments, or any rent, profit or commodity issuing [out] of them), shall be from henceforth deemed and taken as against said creditors and purchasers prior and subsequent to be clearly and utterly void.

§ 7. This Act shall not extend to any estate or interest in any lands, tenements or hereditaments, goods or chattels, or any rents, profits or commons out of the same, which shall be upon valuable consideration and *bona fide* and lawfully conveyed; nor shall it be construed to avoid any deed as against any subsequent *bona fide* purchaser from the grantee for valuable consideration, and without any notice of fraud.

§ 10. Every sale made by a vendor of goods and chattels in his possession, or under his control, unless the same be accompanied by delivery in a reasonable time (regard being had to the situation of the property), and be followed by an actual and continued change of the possession of the things sold, shall be held to be fraudulent and void as against the creditors of the vendor or subsequent purchasers in good faith.—1 *Waggner's Missouri Statutes*, 279 *et seq.*

NEVADA.

292, Sec. 64. Every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of things sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vendor or the creditors of the person making such assignment, or subsequent purchasers in good faith.

297, Sec. 69. Every conveyance or assignment, in writing or otherwise, of any estate or interests in lands or in goods in action, or of any rents or profits issuing therefrom; and every charge upon lands, goods or things in action, or upon the rents and profits thereof, made with the intent to hinder, delay or defraud creditors, or other persons, of their lawful suits, damages, forfeitures, debts or demands; and every bond or other evidence of debt given, suits commenced, decree or judgment suffered, with the like intent as against the persons hindered, delayed or defrauded, shall be void.

300, Sec. 72. The question of fraudulent intent in all cases arising under the provisions of this act, shall be deemed a ques-

tion of fact and not of law; nor shall any conveyance or charge be adjudged fraudulent as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration.

301, SEC. 73. The provisions of this act shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.—*Compiled Laws of Nevada.*

NEW JERSEY.

1. Every deed of gift, and conveyance of goods and chattels, made or to be made, in trust to the use of the person or persons, making the same deed of gift or conveyance, shall be, and hereby is declared to be void and of no effect.

2. And for the avoiding and abolishing of all feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as goods and chattels, which have been and are devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose and intent, to delay, hinder or defraud creditors, and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures and demands, not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, agreements, bargains, contracts and traffic between man and man, without which no commonwealth or civil society can be maintained or continued: All and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or any of them, or of any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution, at any time heretofore had or made, or hereafter to be had or made, to or for any intent or purpose before declared and expressed, shall be deemed and taken (only as against that

person or those persons, his, her or their heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures and demands, by such guileful, covinous or fraudulent devices and practices as aforesaid, are or shall, or may be in anywise disturbed, hindered or defeated), to be clearly and utterly void, frustrate and of no effect; any pretence, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

4. All and every the parties to such feigned, covinous and fraudulent feoffment, gift, grant, alienation, bargain, lease, charge, conveyance, bonds, suits, judgments, executions and other things before expressed, or being privy to and knowing of the same, or any of them, who, at any time hereafter, shall wittingly and willingly put in use, avow, maintain, justify or defend the same, or any of them, as true, simple and done, had or made *bona fide*, and upon good consideration, or shall alien or assign any the lands, tenements, goods, leases or other things before mentioned to him, her or them conveyed as aforesaid, or any part thereof, shall incur the penalty and forfeiture of one year's value of the said lands, tenements and hereditaments, leases, rents, commons or other profits, of or out of the same, and the whole value of the said goods and chattels, and also so much money as is or shall be contained in any such covinous and feigned bond; the one moiety whereof to be to the State and the other moiety to the party or parties grieved by such feigned and fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, leases, rents, commons, profits, charges and other things aforesaid; to be recovered in any court of record by action of debt, bill, plaint or information.

6. This Act, or anything therein contained, shall not extend to, or be construed to impeach, defeat, make void or frustrate any conveyance, assignment of lease assurance, grant, charge, lease, estate, interest or limitation of use or uses of, in, to or out of any lands, tenements or hereditaments, goods or chattels, at any time heretofore had or made, or hereafter to be had or made, upon or for good consideration, and *bona fide*, to

any person or persons, bodies politic or corporate, not having, at the time of such conveyance or assurance to him, her or them made, any manner of notice or knowledge of such covine, fraud or collusion as aforesaid; and also that no lawful mortgage made, or to be made, *bona fide*, and without fraud or covin, and upon good consideration, shall be impeached or impaired, by force of this act; but every such mortgage shall stand in like force and effect, as the same should have done if this act had never been made; anything before in this act to the contrary, notwithstanding.—*The Laws of New Jersey, Nixon's Digest*, 304.

[Nov. 26th, 1794, R. S. 499.]

NEW YORK.

§ 1. All deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same shall be void as against the creditors, existing or subsequent, of such person.

§ 5. Every sale made by a vendor, of goods and chattels in his possession or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, or creditors of the person making such assignment, or subsequent purchasers in good faith; and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the persons claiming under such sale or assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers.—*Title* 2, *Revised Statutes of New York.*

§ 1. Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeit-

ures, debts, or demands, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed or defrauded, shall be void.

§ 3. Every conveyance, charge, instrument or proceeding declared to be void, by the provisions of this chapter, as against creditors and purchasers, shall be equally void against the heirs, successors, personal representatives or assignees of such creditors and purchasers.

§ 4. The question of fraudulent intent in all cases arising under the provisions of this chapter, shall be deemed a question of fact and not of law; nor shall any conveyance or charge be adjudged fraudulent as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration.

§ 5. The provisions of this chapter shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.—*Title* 3, *Revised Statutes of New York.*

NORTH CAROLINA.

1. For avoiding and abolishing feigned, covinous, and fraudulent gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, which may be contrived and devised of fraud, to the purpose and intent to delay, hinder and defraud creditors and others of their just and lawful actions and debts.

The General Assembly of North Carolina do enact, That every gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods and chattels, by writing or otherwise, and every bond, suit, judgment, and execution, at any time had or made, to or for any intent or purpose last before declared and expressed, shall be deemed and taken (only as against that person, his heirs, executors, administrators, and assigns, whose actions, debts, accounts, damages, penalties, and forfeitures, by such covinous or fraudulent devices and practices

aforesaid, are, shall, or might be in any way disturbed, hindered, delayed or defrauded), to be utterly void and of no effect; any pretence, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

3. No voluntary gift or settlement of property by one indebted, shall be deemed or taken to be void in law as to creditors of the donor or settler prior to such gift or settlement, by reason merely of such indebtedness, if property, at the time of making such gift or settlement, fully sufficient and available for the satisfaction of all his then creditors, be retained by such donor or settler; but the indebtedness of the donor or settler at such time shall be held and taken, as well with respect to creditors prior as creditors subsequent to such gift or settlement, to be evidence only from which an intent to delay, hinder, or defraud creditors may be inferred; and in any trial at law shall, as such, be submitted by the court to the jury, with such observations as may be right and proper.

4. Nothing contained in the foregoing sections shall be construed to impeach or make void any conveyance, interest, limitation of use or uses, of or in any lands or tenements, goods or chattels, *bona fide* made, upon any for good consideration, to any person not having notice of such fraud.—*Chap* 50, *Revised Code of North Carolina.*

OHIO.

§ 1. Be it enacted by the General Assembly of the State of Ohio: That all deeds of gifts and conveyances of goods and chattels, made in trust to the use of the person or persons making the same, shall be, and hereby are declared to be void and of no effect.

§ 2. That every gift, grant or conveyance of lands, tenements, hereditaments, rents, goods or chattels, and every bond, judgment or execution, made or obtained with intent to defraud creditors of their just and lawful debts or damages, or to defraud or to deceive the person or persons who shall purchase such lands, tenements, hereditaments, rents, goods or chattels, shall be deemed utterly void and of no effect.—*Chap.* 47, *Revised Statutes of Ohio.*

OREGON.

§ 49. Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands or in goods, or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered with the like intent as against the persons so hindered, delayed or defrauded, shall be void.—*Deady's Statutes, Oregon Code*, 656.

RHODE ISLAND.

Section 1. Every gift, grant or conveyance of lands, tenements, hereditaments, goods, or chattels, or of any rent, interest or profit out of the same, by writing or otherwise, and every note, bill, bond, contract, suit, judgment or execution, had or made and contrived, of fraud, covin, collusion, or guile, to the intent or purpose to delay, hinder or defraud creditors of their just and lawful actions, suits, debts, accounts, damages, or just demands of what nature soever; or to deceive or defraud those who shall purchase *bona fide* the same lands, tenements, hereditaments, goods, or chattels, or any rent, interest, or profit out of them, shall be henceforth deemed and taken as against the person or persons, his, her, or their heirs, successors, executors, administrators, or assigns, and every of them, whose debts, suits, demands, estates, rights, or interests, by such guileful and covinous devices and practices as aforesaid, shall or might be in any wise injured, disturbed, hindered, delayed, or defrauded, to be clearly and utterly void; any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.—*General Statutes of Rhode Island, Chap.* 162.

SOUTH CAROLINA.

Every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements or hereditaments, or of any of them, or

of any lease, rent, commons or profits, or charge out of the same, by writing or otherwise, and every bond, suit, judgment and execution which may be had or made to or for any intent or purpose to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penaltics and forfeitures, shall be deemed and taken (only as against that person or persons, his, her or their heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties and forfeitures, by such guileful, covinous or fraudulent devices and practices as is aforesaid, are, shall or might be in any ways disturbed, hindered, delayed or defrauded), to be clearly and utterly void, frustrate and of none effect; any pretence, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

§ 18. Nothing contained in sections 15, 16 and 17 of this chapter shall extend or be construed to impeach, defeat, make void or frustrate any conveyance, assignment of lease, assurance, grant, charge, lease estate, interest or limitation of use or uses of, in, to or out of any lands, tenements, hereditaments heretofore at any time had or made, or hereafter to be had or made, upon or for good consideration and *bona fide* to any person or persons, bodies politic, anything therein mentioned to the contrary notwithstanding.—*Revised Statutes of South Carolina, Chap.* 82.

TENNESSEE.

Every gift, grant, conveyance of lands, tenements, hereditaments, goods or chattels, or of any rent, common or profit out of the same, by writing or otherwise, and every bond, suit, judgment or execution, had or made and contrived of malice, fraud, covin, collusion or guile, to the intent or purpose to delay, hinder or defraud creditors of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, or to defraud or deceive those who shall purchase the same lands, tenements or hereditaments, or any rent, profit or commodity out of them, shall be deemed and taken only as against the person, his heirs, successors, executors, administrators and assigns, whose debts, suits, demands, estates or interests, by such guileful and covinous practices, as

aforesaid, shall or might be in any wise disturbed, hindered, delayed or defrauded, to be clearly and utterly void; any pretence, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.—*Statutes of Tennessee*, 1 *Thompson & Steger*, § 1759.

TEXAS.

Art. 3876. [1.] Be it further enacted, That every gift, grant or conveyance of lands, slaves, tenements, hereditaments, goods or chattels, or of any rent, common or profit out of the same, by writing or otherwise, and every bond, suit, judgment or execution, had or made and contrived of malice, fraud, covin, collusion or guile, to the intent or purpose to delay, hinder or defraud creditors of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures, or to defraud, or to deceive those who shall purchase the same lands, slaves, tenements or hereditaments, or any rent, profit or commodity out of them, shall be from henceforth deemed and taken only as against the person or persons, his or her or their successors, executors, administrators or assigns, and every of them, whose debts, suits, demands, estates, interests, by such guileful and covinous devices and practices as is aforesaid, shall or might be in any wise disturbed, hindered, delayed or defrauded, to be clearly and utterly void; any pretence, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

Art. 3877. [3.] Be it further enacted, That the second section of this act shall not extend to any estate or interest in any lands, goods, chattels, slaves, or any rents, common or profit out of the same, which shall be upon good consideration and *bona fide* lawfully conveyed or assured to any person or persons, bodies politic or corporate.—*Act of January 18th*, 1840, *Laws of Texas*, *Paschal's Digest.*

VERMONT.

Chapter 113.

§ 32. All fraudulent and deceitful conveyances of houses, lands, tenements, or hereditaments, or of goods and chattels, all

bonds, bills, notes, contracts and agreements, all suits, judgments and executions, made or had to avoid any right, debt, or duty of any other person, shall as against the party or parties only whose right, debt, or duty is attempted to be avoided, their heirs, executors, administrators, or assigns be null and void.

§ 33. All the parties to such fraudulent and deceitful conveyances (of houses, &c.), and to all such suits, &c., as are mentioned in the preceding section, who, being privy thereto, shall justify the same to have been made, had, or executed *bona fide*, and upon good consideration, or who shall alien or assign any such houses, &c., so conveyed to him, or them as aforesaid, shall forfeit the value of such houses, &c., and the value of such goods and chattels, also so much money as is mentioned in such covinous bond, bill, &c.; which forfeitures shall be equally divided between the party aggrieved and the county in which such offense is committed, to be secured by action on the case founded on this statute.

§ 34. In any action brought on the preceding section of this chapter, all persons being parties or privies to such fraudulent and deceitful conveyances may be joined as party defendants in such action.

CHAPTER 34.

§ 48. If any person who is summoned as a trustee shall have in his possession any goods, effects, or credits of the principal defendant, which he holds by a conveyance or title that is void as to the creditors of the defendant, he may be adjudged a trustee on account of such goods, effects or credit, although the principal defendant could not have maintained an action therefor against him.

CHAPTER 65.

§ 28. All fraudulent and deceitful deeds, conveyances and alienations of lands, or of any estate or interest therein, and every charge upon lands, or upon the rents and profits thereof, procured, made, or suffered, with intent to avoid any right, debt, or duty of any person, shall as against such person whose right, debt, or duty shall be so intended to be avoided, his heirs or assigns, be utterly void.

VIRGINIA.

1. Every gift, conveyance, assignment, or transfer of, or charge upon, any estate, real or personal, every suit commenced, or decree, judgment, or execution suffered or obtained, and every bond or other writing given, with intent to delay, hinder, or defraud creditors, purchasers, or other persons, of or from what they are or may be lawfully entitled to, shall as to such creditors, purchasers, or other persons, their representatives or assigns, be void. This section shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.

2. Every gift, conveyance, assignment, transfer, or charge, which is not upon consideration deemed valuable in law, shall be void as to creditors whose debts shall have been contracted at the time it was made, but shall not, on that account merely, be void as to creditors, whose debts shall have been contracted, or as to purchasers who shall have purchased, after it was made; and though it be decreed to be void as to a prior creditor, because voluntary, it shall not for that cause be decreed to be void as to subsequent creditors or purchasers.—*Chap.* 114, *Code of Virginia*, 1873.

WEST VIRGINIA.

1. Every gift, conveyance, assignment, or transfer of, or charge upon any estate, real or personal, every suit commenced, or decree, judgment, or execution suffered or obtained, and every bond or other writing given, with intent to delay, hinder, or defraud creditors, purchasers, or other persons, of or from what they are or may be lawfully entitled to, shall as to such creditors, purchasers, or other persons, their representatives or assigns be void. This section shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.

2. Every gift, conveyance, assignment, transfer, or charge, which is not upon consideration deemed valuable in law, shall be void as to creditors, whose debts shall have been contracted at the time it was made, but shall not, on that account merely, be void as to creditors whose debts shall have been contracted, or as to purchasers who shall have purchased after it was made; and though it be decreed to be void as to a prior creditor, because voluntary, it shall not for that cause be decreed to be void as to subsequent creditors or purchasers.—*Chap.* 74, *Code of West Virginia*, 1868.

WISCONSIN.

§ 1. All deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person.

§ 5. Every sale made by a vendor, of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith; and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the persons claiming under such sale or assignment, that the same was in good faith, and without any intent to defraud such creditors or purchasers.—*Chap.* 107, *Revised Statutes of Wisconsin*, 1871.

§ 1. Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, actions commenced, order or judgment suffered,

with the like intent, as against the persons so hindered, delayed or defrauded, shall be void.

§ 4. The question of fraudulent intent, in all cases arising under the provisions of this title, shall be deemed a question of fact, and not of law, nor shall any conveyance or charge be adjudged fraudulent as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration.

§ 5. The provisions of this title shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.—*Chap.* 108, *Revised Statutes of Wisconsin*, 1871.

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